EXHIBIT 35

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T COMMUNICATIONS,
Complainant,

v. File No. E-89-297

MCI TELECOMMUNICATIONS
CORPORATION,
Defendant.

MEMORANDUM OPINION AND ORDER

Adopted: January 24, 1992; Released: January 28, 1992

By the Commission: Commissioner Quello concurring in the results.

I. INTRODUCTION

1. On August 7, 1989, AT&T Communications filed the above-captioned formal complaint with this Commission pursuant to sections 206 and 208 of the Communications Act[1] and Sections 1.721 *et seq.* of the Commission's Rules.[2] AT&T alleges that MCI Telecommunications Corporation provides common carrier telecommunications services to several customers at rates, and on terms and conditions, that are not filed or contained in interstate tariffs, in violation of section 203 of the Communications Act.[3]

2. Pursuant to our authority under section 208 of the Act, we deny AT&T's complaint in part and dismiss it in part. It would be manifestly unfair to impose liability on MCI for past conduct which the Commission has explicitly authorized. Moreover, the complaint calls into question the prospective lawfulness of longstanding rules that play a fundamental role in our regulation of the interstate marketplace. Any decision relative to those rules could have a profound effect on a broad range of consumers and providers of telecommunications services. This decision should not be made in an adjudicatory proceeding between two parties.

3. The proper procedural vehicle for considering changes in our forbearance rule is a rulemaking proceeding. In a companion order adopted today, we institute such a proceeding so that the issues raised by AT&T may be addressed in an appropriate manner.[4]

II. BACKGROUND

4. In 1979, the Commission initiated the *Competitive Carrier* rulemaking proceeding in order to consider amendment of the tariff filing requirements for competitive common carriers, as well as other rule changes relating to facilities and service authorizations."[5] In the *Second Report and Order*, adopted in 1982, the Commission concluded that nondominant telecommunications common carriers -- defined as those carriers without market power -- lacked both the incentive and ability rationally to charge rates that would violate the Communications Act's substantive requirements that rates be just and reasonable and not unreasonably discriminatory.[6] For such carriers, the Commission concluded that tariff filing requirements tended to "inhibi[t] price competition, service innovation and the ability of firms to respond quickly to market trends,"[7] and therefore were inconsistent with the Act's broader mandate "to make available, .. to all people of the United States a rapid, efficient Nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges."[8] Accordingly, the Commission adopted its previous tentative conclusion that, in these circumstances, section 203 of the Act did not mandate the filing of tariffs by nondominant carriers.[9]

5. Taking a cautious, incremental approach, the Commission limited the scope of the initial forbearance rule to resale carriers, ordering that such carriers "no longer need adhere to... the tariff filing requirements of section 203," although they were free to continue to file tariffs if they so chose.[10] One year later, in the *Fourth Report and*

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[1] 47 U.S.C. §§ 206 and 208.

[2] 47 C.F.R. § 1.721 *et seq.*

[3] 47 U.S.C. § 203. Section 203(a) provides that "[e]very common carrier... shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection, schedules showing all charges for itself... and showing the classifications, practices and regulations affecting such charges." Section 203(c) provides that "[n]o carrier, unless otherwise provided by or under authority of this Act, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this Act, .. and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation, for such communication, or for any service in connection therewith..."

[4] *See* Tariff Filing Requirements for Interstate Common Carriers, Notice of Proposed Rulemaking, CC Docket No. 92-13, FCC 92-35, adopted January 24, 1992.

[5] Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d 308, 309 (1979).

[6] *See* 47 U.S.C. §§ 201(b), 202(a).

[7] Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, Second Report and Order, 91 FCC 2d 59, 65 (1982).

[8] *Id.* at 64, *quoting*, 47 U.S.C. § 151.

[9] *Id.* at 71, *citing*, Policy and Rules Concerning Rates for Competitive Carrier Services and Facilities Authorizations Therefore, Further Notice of Proposed Rulemaking, 84 FCC 2d 445, 479, 484 (1981). The Commission concluded that the statute's substantive standards could be enforced most effectively against nondominant carriers through the complaint procedures specified in section 208 of the Act, rather than through tariff investigations. Second Report and Order, 91 FCC 2d at 70-71. As we state in note 26, *infra*, we do not consider AT&T's complaint an attempt to enforce the substantive provisions of the statute. AT&T, in this case, is using the complaint process in order to attempt to change a long-standing Commission rule.

[10] *Id.* at 73.

Order, the Commission extended forbearance to all nondominant interexchange carriers (IXCs) including so-called "specialized carriers" such as MCI.[11]

6. Neither AT&T nor any other participant in the *Competitive Carrier* proceeding sought judicial review of the Commission's decision to forbear from tariff regulation of nondominant carriers. The Commission to date has not reconsidered those policies and rules, and no court has reviewed them.[12] Today there are in excess of four hundred nondominant IXCs that offer common carrier services.[13] Few, if any, of these carriers file tariffs for all their service offerings, and most do not file any tariffs at all.

A. The Complaint

7. AT&T's complaint alleges that MCI provides interstate telecommunications services to large business customers, at rates and on terms and conditions that are not filed or contained in MCI tariffs.[14] According to AT&T, MCI's actions violate section 203 of the Communications Act.

8. AT&T argues that MCI is not relieved of its obligation to file tariffs by its classification as a nondominant carrier under the Commission's *Competitive Carrier* rules. In support of its position, AT&T cites *MCI v. FCC*, which, it claims, held that the tariffing provisions of Section 203 are mandatory, and may not be lifted as to any carrier.[15] AT&T also cites a 1990 Supreme Court decision, *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, which, AT&T claims, confirms that MCI's conduct violates section 203.[16]

B. MCI's Response

9. MCI admits that it has provided service to the six named customers other than by tariff[17] but argues that AT&T has failed to establish a *prima facie* case against MCI. MCI claims that it has, at all times, abided by the Commission's *Competitive Carrier* rules and that its actions therefore fully complied with the Communications Act as interpreted and applied by the Commission.[18] MCI argues that *MCI v. AT&T* is inapposite to AT&T's complaint since that case only decided that mandatory forbearance was unlawful.[19] Likewise, MCI argues that, since *Maislin* involved a different agency under a different statute involving different factual circumstances, that case has no bearing on the non-tariff arrangements that MCI and other nondominant IXCs have entered into with customers.[20]

10. MCI also argues that AT&T's complaint is fundamentally a petition for reconsideration of the Commission's *Competitive Carrier* rules. It claims that, as such, the complaint is untimely in violation of Section 405 of the Act and Section 1.106(f) of the Commission's Rules.[21]

11. Finally, MCI argues that AT&T's complaint is not the proper vehicle for modifying the *Competitive Carrier* rules. It states that if the Commission were to decide within the context of the complaint that MCI's failure to tariff its service to some customers is a violation of Section 203 of the Act, the Commission would be modifying *Competitive Carrier* without benefit of an appropriate rulemaking. It argues that any reassessment of those policies and rules should involve all parties who are potentially affected by such reassessment.[22]

III. DISCUSSION

12. We now deny AT&T's complaint in part and dismiss it in part.[23] We deny AT&T's complaint insofar as it seeks damages against MCI for its past conduct in offering service at rates and on terms and conditions not contained in tariffs filed with the Commission. That claim directly conflicts with the duly adopted "forbearance" rule upon which MCI was entitled to rely. We dismiss AT&T's complaint insofar as it seeks injunctive relief requiring MCI to file tariffs in the future. AT&T seeks, in effect, the wholesale repeal of that rule, which has governed interexchange competition for the better part of a decade.

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[11] Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, Fourth Report and Order, 95 FCC 2d 554 (1983). The Commission also expanded the class of nondominant IXCs to include miscellaneous common carriers, domestic satellite carriers (domsats), domsat resellers, domestic operations of Western Union, international record carriers, other record carriers, and interexchange carriers affiliated with exchange telephone companies. *Id.* 95 FCC 2d at 557.

[12] Later in the *Competitive Carrier* proceeding, the Commission adopted rules which compelled nondominant carriers to cancel their existing tariffs and prohibited future tariff filings. Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, Sixth Report and Order, 99 FCC 2d 1020 (1985). Mandatory forbearance, as it was called, was overturned after judicial review. *See* MCI Telecommunications Corp. v. FCC, 765 F.2d 1186 (D.C. Cir. 1985) (hereinafter "MCI v. FCC"). The court in that case, however, explicitly "d[id] not reach the question whether the FCC's earlier permissive orders are invalid." *Id.* at 1190-1191, n. 4.

[13] Summary of Long Distance Carriers, Industry Analysis Division, FCC, November 22, 1991, Table 1.

[14] Specifically, AT&T alleges that MCI provides off-tariff service to Merrill Lynch, the Westin Hotel Company, United Airlines, the Department of Defense, the University of Colorado at Boulder, and Uniguard Security Insurance Program. AT&T Complaint at 7-10.

[15] AT&T Complaint at 3, *citing*, MCI v. AT&T, 765 F.2d at 1188, 1192-93.

[16] Motion of American Telephone and Telegraph Company for Summary Decision at 7-11, *citing*, Maislin Industries, U.S., Inc. v. Primary Steel, Inc., _____ U.S., _____ 110 S. Ct 2759 (1990) (hereinafter "Maislin"). In March 1990, we initiated a comprehensive examination of the state of competition in the long-distance marketplace with a view toward relaxing some of our regulatory controls over AT&T. Competition in the Interstate Interexchange Marketplace, Notice of Proposed Rulemaking, 5 FCC Rcd 2627 (1990). Pending completion of this proceeding, we deferred consideration of AT&T's complaint. The Commission recently adopted rules in that proceeding. Competition in the Interstate Interexchange Marketplace, Report and Order, 6 FCC Rcd 5880 (1991), *recon. pending*.

[17] MCI's Opposition To Motion To Compel at 2.

[18] MCI's Motion to Dismiss at 1-3, 7-9.

[19] MCI's Motion to Dismiss at 6-7, 16-18.

[20] MCI's Opposition to Motion of American Telephone and Telegraph Company for Summary Decision at 4-5.

[21] Section 405 of the Act and Section 1.106(f) of the Commission's Rules establish a 30-day deadline for filing requests for reconsideration of Commission orders. *See* 47 U.S.C. § 405; 47 C.F.R. § 1.106(f).

[22] MCI's Motion to Dismiss at 13-15.

[23] We note that section 208(a) of the Communications Act requires the Commission to investigate complaints "in such manner and by such means as it shall deem appropriate."

We find such broad relief to be inappropriate in the context of this adjudicatory proceeding between only two of the industry's numerous participants. By companion order adopted today, we initiate a rulemaking proceeding to reexamine our forbearance rule.[24]

13. We deny AT&T's complaint insofar as it claims that MCI is liable for damages because its practice of providing service off-tariff violates section 203 of the Act. MCI's conduct, in this regard, at all times complied with what the Commission, in the *Fourth Report and Order*, has said MCI may do, *i.e.*, provide interstate telecommunications service at rates and on terms that are not contained in tariffs on file with the Commission.[25] Contrary to AT&T's claim that the forbearance policy reflects merely an exercise of the Commission's prosecutorial discretion, the *Fourth Report and Order* adopted a binding substantive rule that removed the requirement that nondominant carriers such as MCI file tariffs. Under these circumstances, it would be manifestly unfair to entertain AT&T's claim that MCI's alleged past conduct, which the Commission explicitly approved in advance, may give rise to a finding of liability.[26] Any off-tariff service offerings by MCI have been made pursuant to rules promulgated by the FCC in orders that were not challenged on review and have long since become final. We will not award damages against MCI based simply on allegations made years later that the rules to which MCI conformed its conduct are beyond our authority to adopt.

14. We also dismiss AT&T's complaint insofar as it seeks prospective relief enjoining MCI from providing off-tariff services. This claim, while nominally stated in terms of a request for relief against MCI, is in practical effect a challenge to the Commission's previously adopted and effective forbearance rule.

15. It is well established that agencies have broad discretion in determining whether to make policy via rulemakings or adjudications. Thus, in *SEC v. Chenery*, the United States Supreme Court said that "the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency."[27] The Court recognized, however, that rulemaking proceedings are more appropriate for considering general rules of widespread applicability.[28]

16. The Commission's forbearance rule was adopted in a notice and comment rulemaking proceeding and has been in place for almost ten years. This rule represents one of the cornerstones of our regulation of the long-distance industry. Any change in this fundamental policy would have a significant impact on a broad range of customers and providers of telecommunications services across the nation. It would be inappropriate for us to consider a modification or repeal of this policy, with so potentially widespread an impact, in the context of a two-party adjudicatory proceeding, as opposed to a rulemaking proceeding. In a rulemaking, all interested parties will have the opportunity to comment. In addition, a rulemaking proceeding will permit us to address our forbearance rule as it applies to all nondominant carriers, and to consider and implement any changes that we may make to it on an industry-wide basis.[29] Given the fundamental importance of these matters, the coordinated and comprehensive approach made possible by a rulemaking will reduce industry uncertainty, while ensuring the smoothest possible transition to any new rules that may be necessary.

IV. CONCLUSION

17. We now deny in part and dismiss in part AT&T's complaint. To the extent that AT&T seeks damages against MCI for its past conduct in offering service at rates and on terms and conditions not contained in tariffs filed with the Commission, AT&T's claim directly conflicts with the duly adopted and effective "forbearance" rule upon which MCI was entitled to rely. To the extent that AT&T seeks injunctive relief requiring MCI to file tariffs in the future, we find such broad relief changing the basic rules governing the long-distance industry to be inappropriate in the context of this adjudicatory proceeding between only two of the industry's numerous participants. The proper procedural vehicle for considering changes in our forbearance rule is a rulemaking proceeding. In a companion order adopted today, we institute such a proceeding so that the issues raised by AT&T may be addressed in an appropriate manner.

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[24] *See* note 4, *supra*.

[25] While AT&T asked the Commission in its complaint to investigate whether MCI had violated sections 201(b) and 202(a) of the Communications Act, *see* AT&T Complaint at 12-13, it appears to have disavowed this request and limited its complaint to alleged violations of section 203 of the Act. *See* AT&T Petition for Writ of Mandamus, Case No. 91-1487 (D.C. Cir., filed October 4, 1991), at 2-3; MCI Telecommunications Corp. v. FCC, No. 89-1382, Transcript of Oral Argument held September 11, 1990, at 50-51 (comments of AT&T counsel in petition for review of Commission's Tariff 12 decision).

[26] *Cf.* Arizona Grocery v. Atchison, Topeka and Santa Fe Railway Co., 284 U.S. 370, 389 (1932); Nader v. FCC, 520 F.2d 182, 202-203 (D.C. Cir. 1975) (rates charged consistent with agency prescription protect carrier against subsequent claim that rate was unlawful). *See also* Bowen v. Georgetown University Hospital, _____ U.S., _____ 109 S. Ct. 468, 480 (1988) (Scalia, J., concurring) (suggesting that retroactive adjudication may be improper where conflicting "preexisting interpretive rule construing [statutory] requirements is in effect").

[27] 332 U.S. 194, 203 (1947).

[28] *Id.* at 202, 203; *see also* American Federation of Government Employees v. FLRA, 777 F.2d 751, 759 (D.C. Cir. 1985); Telocator Network of America v. FCC, 691 F.2d 525, 551 (D.C. Cir. 1982).

[29] By contrast, any order that we issue on AT&T's complaint would necessarily bind only MCI. *See* NLRB v. Wyman-Gordon Company, 394 U.S. 759, 763-766 (1969) ("adjudicated cases may and do, of course, serve as vehicles for the formulation of agency policies, which are applied and announced therein... But this is far from saying... that commands, decisions or policies announced in adjudication are 'rules' in the sense that they must, without more, be obeyed by the affected public.") At the same time, such an order would have major precedential implications for other nondominant IXCs, and could, depending upon the decision, create considerable uncertainty both as to their regulatory status and the lawfulness of many of their current offerings.

V. EX PARTE RULES

18. In light of the interrelationship between this proceeding and the Notice of Proposed Rulemaking we adopt today, to the extent this complaint proceeding remains pending through a petition for reconsideration or appeal of this order, the proceeding will henceforth be deemed a non-restricted proceeding under the Commission's *ex parte* rules.[30] Ex parte presentations will be permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission Rules.[31]

VI. ORDERING CLAUSE

19. For the reasons set forth above, pursuant to 47 U.S.C. § 208, IT IS ORDERED THAT AT&T'S above-referenced complaint is DENIED in part and DISMISSED in part.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[30] *See* 47 C.F.R. § 1.1200(a).

[31] *See generally* 47 C.F.R. §§ 1.1202, 1.1203, 1.1206(a).

EXHIBIT 36

154 F.3d 478

332 U.S.App.D.C. 156

James A. CASSELL and Kelley Communications, Inc., Petitioners,
v.
FEDERAL COMMUNICATIONS COMMISSION and United States of America, Respondents.
Potomac Corporation, d/b/a Crescent Communications, Intervenor.

No. 97-1005.
Consolidated with No. 97-1006.

United States Court of Appeals,
District of Columbia Circuit.

Argued Nov. 3, 1997.
Decided Sept. 11, 1998.

[332 U.S.App.D.C. 157] On Petitions for Review of an Order of the Federal Communications Commission.

Dennis C. Brown argued the cause for petitioners, with whom Sydney L. Steele was on the briefs. Lewis J. Paper and Robert H. Schwaniger, Jr. entered appearances.

Nancy L. Kiefer, Counsel, Federal Communications Commission, argued the cause for respondents, with whom William E. Kennard, General Counsel at the time the brief

[332 U.S.App.D.C. 158] was file, and Daniel M. Armstrong, Associate General Counsel, were on the brief.

Before: SILBERMAN, WILLIAMS and GARLAND, Circuit Judges.

Opinion of the Court filed by Circuit Judge GARLAND.

GARLAND, Circuit Judge:

Petitioners in these consolidated cases contend that the Federal Communications Commission ("FCC") improperly denied their requests for "finder's preferences" regarding certain private mobile land radio stations. We find no infirmity in the FCC's decisions and deny the petitions for review. [1]

I

The FCC regulates the licensing of portions of the broadcast spectrum used to provide one- and two-way communications services known as private land mobile radio services. See 47 U.S.C. § 332 (1994 & Supp.1998). These services include trunked specialized mobile radio ("trunked SMR") systems, which operate over several frequencies by means of centralized stations that send and receive communications between mobile radio units. See 47 C.F.R. § 90.7. An applicant for a license to operate a trunked SMR system must specify both the street address and the geographic coordinates (longitude and latitude), to the nearest second, from which it will operate the station. See, e.g., Joint Appendix ("J.A.") at 11; see also FCC 574,

Application for General Mobile Radio Service at 2 (Mar.1998).

In 1991, after providing notice and an opportunity for comment, the FCC adopted a finder's preference program applicable to, inter alia, trunked SMRs on certain frequency bands. See In re Amendment of Parts 1 and 90 of the Commission's Rules Concerning the Construction, Licensing, and Operation of Private Land Mobile Radio Stations, 6 F.C.C.R. 7297, 7302-09 (1991) ("Report and Order"). [2] The program was a response to the increased demand for, and resulting scarcity of, these frequencies. Because of that scarcity, it was "becoming difficult for new applicants to become licensed or for existing licensees to expand their systems." Id. at 7303. The purpose of the finder's preference program was to create "new incentives for persons to provide [the FCC] information about unconstructed, nonoperational, or discontinued private land mobile radio systems...." Id. at 7309. The program, the FCC said, "would enhance spectrum efficiency by identifying more unused channels and reassigning them to persons who will use them effectively." Id.

Under the finder's preference program, if an applicant presents the FCC with evidence that leads to the cancellation of a license due to the licensee's noncompliance with certain regulations, the applicant is entitled to seek a dispositive preference for the recovered frequencies. See 47 C.F.R. § 90.173(k); see also Keller Communications, Inc. v. FCC, 130 F.3d 1073 , 1075 (D.C.Cir.1997). A finder, however, must be independently eligible for a license for the frequencies in question, see 47 C.F.R. § 90.173(k), and the FCC retains the "right to assure that the awarding of the preference is in the public interest...."

[332 U.S.App.D.C. 159] ...." Report and Order, 6 F.C.C.R. at 7303 n. 64.

The FCC limited the finder's preference program to those "rule violations which lend themselves to conclusive and expeditious action." Id. at 7305. Pre-existing FCC regulations made subject to the finder's program include the requirement that a licensee of a trunked SMR facility complete station construction, see 47 C.F.R. § 90.631(e), and place the station "in permanent operation, in accordance with the technical parameters of the station authorization," generally within one year, id. § 90.631(f) (emphasis added). See id. § 90.173(k); Report and Order, 6 F.C.C.R. at 7305. In the Report and Order in which it adopted the program, the FCC declared that it would "continue to apply [these] existing rules," rather than modify them, but would "now enforce these rules" as follows: "Construction of the base station must be in substantial accordance with the parameters specified in the station authorization (e.g., authorized antenna height). All channels not so 'constructed' will be recovered from the licensee." Id. at 7299 (emphasis added). The FCC did not define the term "substantial accordance."

Between 1991 and 1993, the FCC's Wireless Telecommunications Bureau (formerly known as the Private Radio Bureau, and hereinafter referred to as "the Bureau") granted approximately 75 finder's preferences in instances where a licensee had failed to construct or operate its station in a timely fashion or had discontinued operations. See FCC Br. at 8 n.7. On January 11, 1994, the Bureau's Licensing Division ruled for the first time on a preference request based on a licensee's failure to construct its station at its licensed coordinates. In that case, In Re Fred B. Lott, the existing licensee had constructed its SMR station more than five miles from the location at which it was licensed. See 9 F.C.C.R. 225 (1994). The Division canceled the license and awarded a finder's preference. Citing the Report and Order, the Division noted that "failure to construct in substantial accordance with licensed parameters results in automatic cancellation of a license," and concluded that a five-mile deviation was not in "substantial accordance." Id. at 225 (emphasis added). The Division distinguished an earlier case in which the Bureau purportedly had permitted a station operating one-fifth of a mile from its authorized coordinates to remain licensed, saying that the "distances are not comparable." Id. And it declared that "[a]s a rule of thumb, construction more than one second, (60 feet), away from the licensed location is not in accordance with the station's authorization." Id. (emphasis added). [3]

On March 11, 1994, petitioner Lawrence Vaughn filed a finder's preference request for the license held by Ross and Barbara Shade to operate SMR Station WNXE819 in Sherman Oaks, California. Vaughn alleged that the Shades had violated the trunked SMR construction rule, 47 C.F.R. § 90.631(f), because the station was located 3100 feet (just over 1/2 mile) from the coordinates specified in the license. The Shades responded that the discrepancy was inadvertent: the street address listed on the license was correct, but they had relied on the coordinates licensed to the previous operator of the station at the site. On August 18, 1994, the Bureau's Licensing Division denied Vaughn's finder's preference request, ruling that the Shades were in "substantial accordance" with the conditions of their license. See In re Lawrence E. Vaughn, Jr., 9 F.C.C.R. 4438, 4438-39 (1994). At the same time, the Division concluded that it should no longer decide "substantial accordance" on a case-by-case basis, and instead adopted the following benchmark: "With respect to a variance from authorized coordinates, absent unique circumstances, we will only award a finder's preference for a constructed and operating station when a finder demonstrates that the authorized coordinates are more than 1.6 kilometers (one mile) from the actual location of the station." Id.

The other applications at issue in these cases were filed in May 1994, by James

[332 U.S.App.D.C. 160] Cassell and Kelley Communications. The two applicants filed nearly identical finder's preference requests for SMR Station KNEW202 in Golden, Colorado. The requests alleged that the station antenna was 639 feet away from its licensed coordinates. As in Vaughn, the existing licensee did not dispute the discrepancy, but noted that the street address was correct. On May 11, 1995, the Bureau denied the requests for finder's preferences, concluding that a discrepancy of 639 feet was de minimis. See J.A. at 196.

Cassell, Kelley Communications, and Vaughn all filed applications for review with the Commission. Each argued that the decision in Lott had established one second or 60 feet as the definition of "substantial accordance," and that under this definition the target licensee was not in substantial accordance with its authorized coordinates.

On December 4, 1996, the FCC denied the three applications for review. See In re James A. Cassell, 11 F.C.C.R. 16,720 (1996). The Commission noted that the Report and Order indicated frequencies would be recovered from licensees only if their stations were not constructed in "substantial accordance" with their authorized parameters. See id. at 16,723. It had never previously defined "substantial accordance," the Commission said, but instead had determined its meaning on a case-by-case basis. See id. Contrary to petitioners' contention, it said the Bureau also had not previously defined "substantial accordance." The one-second standard in Lott, the FCC held, "describes a situation where exact accordance with a licensee's authorization is not met, rather than defining substantial accordance." Id.

The FCC agreed that some benchmark definition of "substantial accordance" would "enhance the overall effectiveness and efficiency of our finder's program." Id. at 16,725. It rejected the one-second definition advocated by petitioners as "unnecessarily restrictive." Id. at 16,724. As the FCC explained, the principal motivation for the finder's preference program was "to facilitate capturing unused channels so that licensing opportunities could be provided in those areas where there is limited available spectrum." Id. (emphasis added). The program should not be used "as a means to disrupt service being provided to the public by alleging license cancellation based on minor variations from authorized parameters." Id.

After rejecting petitioners' one-second standard, the FCC concluded that it should instead adopt the 1.6-kilometer definition used by the Bureau in the Vaughn case. "[T]his benchmark," the Commission determined, "is consistent with a variety of relevant factors including: the range of private land mobile radio systems, our experience with the accuracy of systems currently licensed, and the type of violation which evidences an inappropriate disregard for the requirements of our rules." Id. The FCC also noted that "a 1.6 kilometer benchmark has been

used successfully in the context of geographic coordinates near certain mountain peaks," id. at 16,724 n. 21--that is, under one FCC regulation, a station within 1.6 kilometers of a mountain peak is considered to be at the peak. See 47 C.F.R. § 90.621(b).

Finally, the FCC said that it would regard the 1.6-kilometer measure as a benchmark and not an absolute. It recognized that there may be situations where variances below 1.6 kilometers are not "minor," for example when they jeopardize air safety or when a licensee "knowingly constructed at another site for purposes of changing its station's coverage footprint." See 11 F.C.C.R. at 16,724. The 1.6-kilometer benchmark, the Commission said, would "provide potential filers of finder's preference requests guidance regarding their burden of proof." Id. at 16,725. For variations of less than 1.6 kilometers, finder's preferences still would be possible, but applicants would have the burden of demonstrating why a particular variance is not minor. The FCC concluded that the benchmark, together with this qualifier, would provide "a rational standard that fosters continued provision of service to the public rather than requiring disruption of service through cancellation of licenses for minor errors in location of stations...." Id. at 16,724.

Applying its new benchmark, the Commission concluded petitioners had failed to establish that the target licensees were not in [332 U.S.App.D.C. 161]

"substantial accordance" with their authorized coordinates. Accordingly, it denied their applications for review.

II

Petitioners contend that the FCC's denial of their finder's preference requests violated fundamental principles of administrative law, in four ways. They argue that the FCC: (1) failed to follow its own precedents and rules; (2) failed to provide a rational explanation for its decision; (3) adopted what amounts to a substantive rule without providing notice or opportunity for comment; and (4) unlawfully applied its new benchmark retroactively. [4] We consider these arguments in turn.

A

Petitioners contend that the 1.6-kilometer benchmark announced by the FCC departs from the one-second standard announced in Lott. They also contend that the new benchmark contradicts 47 C.F.R. § 90.173(k), the regulation governing the finder's preference program, and 47 C.F.R. § 90.631(f), the underlying regulation that mandates cancellation of a license "[i]f a station is not placed in permanent operation, in accordance with the technical parameters of the authorization...." Id. (emphasis added). Citing our opinion in Reuters, Ltd. v. FCC, 781 F.2d 946 (D.C.Cir.1986) , petitioners contend this failure to follow the agency's own precedents and rules violates a basic requirement of rational decision-making.

As noted above, the FCC does not regard its decision as departing from the one-second standard for "substantial accordance" set in Lott, because it does not regard Lott as setting any such standard. Instead, the FCC reads Lott as setting one second as a standard defining exact "accordance" for purposes of license applications and authorizations, "rather than defining substantial accordance" for purposes of the finder's preference program. Cassell, 11 F.C.C.R. at 16,723.

An agency's interpretation of its own precedent is entitled to deference, see Inland Lakes Management, Inc. v. NLRB, 987 F.2d 799 , 805 (D.C.Cir.1993), and the FCC's reading of Lott, which distinguishes between "accordance" and "substantial accordance," is a reasonable one. Lott itself used these two verbal formulations. It referred to the one-second standard as a rule of thumb for determining when a station is located in "accordance" with its authorization, but said that a station deviating by more than five miles was not in "substantial accordance" with its

authorization. The FCC's reading is further supported by the way in which Lott itself distinguished an earlier Bureau decision to tolerate a station's onefifth mile deviation. If petitioners' reading of Lott were correct, the one-fifth of a mile deviation should have led to license cancellation because the location was not in "substantial accordance." Instead, Lott indicated it would tolerate such a deviation, a result consistent with the FCC's view that although not in "accordance," a deviation of one-fifth of a mile remains in "substantial accordance." The three situations Lott considered describe a continuum that is consistent with the FCC's reading: a one-second deviation is in "accordance" with parameters, a one-fifth of a mile deviation is in "substantial accordance," and a five-mile deviation is in neither "accordance" nor "substantial accordance." [5]

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[332 U.S.App.D.C. 162] In addition to Lott, petitioners rely on 47 C.F.R. §§ 90.173(k) and 90.631(f) to argue that the Commission contravened its own regulations by adopting a 1.6-kilometer benchmark. Section 90.173(k), petitioners point out, states that a person may seek a finder's preference by providing information "regarding the failure of existing licensees to comply with the provisions" of § 90.631(f). And § 90.631(f) provides that "[i]f a station is not placed in permanent operation, in accordance with the technical parameters of the station authorization, within one year, ... its license cancels automatically and must be returned to the Commission." Since section 90.631(f) refers to "accordance" rather than "substantial accordance," and since the technical parameters of a station's authorization include geographical coordinates listed to the second, petitioners insist there is no room for a reading that permits a target licensee to defeat a finder's preference by merely being in "substantial accordance."

In its opinion below, the FCC interpreted its own regulations differently than petitioners do, and we are bound to defer to that interpretation unless it is " 'plainly erroneous or inconsistent with the regulation.' " Auer v. Robbins, **519 U. S. Reports 452** , 117 S.Ct. 905 , 911, 137 L.Ed.2d 79 (1997) ; see also Freeman Eng'g Assocs. v. FCC, 103 F.3d 169 , 178 (D.C.Cir.1997). The FCC read the Report and Order that established the finder's program as indicating that stations would be recovered from their licensees only if they were not "in 'substantial accordance' with the parameters specified in the station authorization." Cassell, 11 F.C.C.R. at 16,723 (quoting Report and Order, 6 F.C.C.R. at 7299). This is the same conclusion the Bureau reached in Lott, the opinion upon which petitioners rely. There, citing the Report and Order, the Bureau noted that "failure to construct in substantial accordance with licensed parameters results in automatic cancellation of a license...." Lott, 9 F.C.C.R. at 225 (emphasis added).

The FCC's interpretation follows logically from the language of the Report and Order. In the Report, the FCC declared that it would "continue to apply" § 90.631(f), but would do so subject to a new standard of enforcement: "Construction of the base station must be in substantial accordance with the parameters specified in the station authorization.... All channels not so 'constructed' will be recovered from the licensee." Id. (emphasis added). That declaration supports the FCC's view that a finder's preference is unwarranted unless a station is not in "substantial accordance" with its licensed parameters, and that the "substantial accordance" enforcement standard describes a larger margin of error than the exact "accordance" required by the underlying rule.

Because the FCC's interpretation of its own regulations is reasonable, we defer to it. And because under that interpretation the decision below does not depart from those regulations, we find no inconsistency in the Commission's actions.

B

Petitioners' second contention is that the FCC adopted the 1.6-kilometer standard without providing a reasoned explanation that rationally relates the standard to the finder's program's purposes and the agency's statutory obligations. We agree that a rational explanation is required to support agency decision-making, see, e.g., Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., **463 U. S. Reports 29** , 43, 103 S.Ct. 2856 , 77 L.Ed.2d 443 (1983) , but find the

explanation offered by the FCC to be perfectly reasonable.

First, the FCC concluded that deciding on a benchmark definition of "substantial accordance," rather than continuing to apply the term on a case-by-case basis, would enhance the overall effectiveness of the finder's program. See Cassell, 11 F.C.C.R. at 16,724. Petitioners do not dispute the reasonableness of that conclusion; to the contrary, they tout their own preferred benchmark and disparage the alternative of case-by-case adjudication

[332 U.S.App.D.C. 163] as inappropriately "subjective." Petitioners' Br. at 17.

Second, the FCC concluded that petitioners' proposed one second standard would be "unnecessarily restrictive." Cassell, 11 F.C.C.R. at 16,724. That threshold, the FCC predicted, would "disrupt service being provided to the public ... based on minor variations from authorized parameters." Id. Such a result would be inconsistent with the program's purpose of "enhanc[ing] spectrum efficiency by identifying more unused channels...." Report and Order, 6 F.C.C.R. at 7309 (emphasis added). Indeed, unlike the revocation of a license for failing to construct a station, revocation for operating at a slight variance does little to fulfill the program's underlying purpose of mitigating the problem of spectrum scarcity.

Third, the FCC concluded that a 1.6- kilometer benchmark would serve the program's goal of motivating finders, without needlessly disrupting ongoing service for minor deviations. The petitioners charge that there is no "rational basis" for choosing 1.6 kilometers over any other distance. But the FCC did offer plausible reasons. It found the 1.6-kilometer benchmark reasonable in relation to the normal range of private land mobile radio systems, which is generally at least 20 miles. See 47 C.F.R. § 90.635. It found the benchmark consistent with the Commission's own experience with the accuracy of systems currently in operation. And it concluded that a 1.6-kilometer benchmark was large enough to "evidence[ ] an inappropriate disregard for the requirements of our rules"--for example, an intention to change the station's coverage footprint from that which was authorized--rather than a mere inadvertent error. Cassell, at 16,724. Finally, the Commission noted that the same benchmark had been "used successfully in the context of geographic coordinates near mountain peaks." Id. at 16,724 n. 21 (citing 47 C.F.R. § 90.621(b)).

We are generally "unwilling to review line-drawing performed by the Commission unless a petitioner can demonstrate that lines drawn ... are patently unreasonable, having no relationship to the underlying regulatory problem." Home Box Office, Inc. v. FCC, 567 F.2d 9 , 60 (D.C.Cir.1977). Here, the FCC has provided a reasonable explanation for the line it has drawn, and demonstrated that line's relationship to the underlying regulatory problem addressed by the finder's preference program. It is also a line that is consistent with the Commission's statutory obligation to "manage the spectrum to be made available for use by the private land mobile services" in a manner that will "improve the efficiency of spectrum use and reduce the regulatory burden upon spectrum users." 47 U.S.C. § 332(a)(2).

C

Petitioners' third contention is that, by defining "substantial accordance" through a benchmark, the FCC effectively adopted a substantive rule. Under the Administrative Procedure Act, an agency may adopt such a rule only after providing notice and an opportunity for interested parties to comment. See 5 U.S.C. § 553. Since the FCC did not follow such rulemaking procedures here, petitioners contend the FCC's decision should be invalidated.

This argument, however, comes too late. Section 405(a) of the Federal Communications Act requires that the Commission be given an "opportunity to pass" on a question of fact or law before a petitioner may bring it to this court. 47 U.S.C. § 405(a); see Time Warner Entertainment Co. v. FCC, 144 F.3d 75 , 79 (D.C.Cir.1998); Bartholdi Cable Co. v. FCC, 114 F.3d 274 , 279

(D.C.Cir.1997). Petitioners knew full well that the Commission would address the 1.6-kilometer benchmark, since the Bureau had adopted that benchmark in the proceeding below. Nonetheless, they failed to argue before the Commission that a benchmark could not be adopted without notice and comment rulemaking. To the contrary, petitioners argued that the Commission had already adopted a valid benchmark through the decision in Lott which, like this case, was an adjudication rather than a rulemaking. By failing to give the Commission an opportunity to consider this argument, petitioners have precluded review in this court.

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[332 U.S.App.D.C. 164] Petitioners' argument is, in any event, without merit. The FCC's interpretation of "substantial accordance" arose in the context of an adjudication of petitioners' applications for finder's preferences. It is well settled that an agency "is not precluded from announcing new principles in an adjudicative proceeding...." NLRB v. Bell Aerospace Co., **416 U. S. Reports 267** , 294, 94 S.Ct. 1757 , 40 L.Ed.2d 134 (1974) . Rather, "the choice between rulemaking and adjudication lies in the first instance within the [agency's] discretion." Id.; see also Securities & Exchange Comm'n v. Chenery Corp., **332 U. S. Reports 194** , 203, 67 S.Ct. 1575 , 91 L.Ed. 1995 (1947) ; City of Orrville v. FERC, 147 F.3d 979 , 988 n. 11 (D.C.Cir.1998).

D

Finally, petitioners contend that the FCC acted unlawfully by applying the 1.6-kilometer benchmark retroactively to their finder's preference requests. They urge us to analyze that retroactive application under the five-factor test set forth in Clark-Cowlitz Joint Operating Agency v. FERC, which we have used as the "framework for evaluating retroactive application of rules announced in agency adjudications." 826 F.2d 1074 , 1081 (D.C.Cir.1987) (en banc). [6] Petitioners contend that the retroactive application of the 1.6-kilometer benchmark fails to survive that test.

There is no need to plow laboriously through the Clark-Cowlitz factors here. As we said in that case, the test's factors "boil down ... to a question of concerns grounded in notions of equity and fairness." Id. at 1082 n. 6. Indeed, that is the gravamen of petitioners' complaint: it is unfair, they say, to apply the new 1.6-kilometer benchmark to their requests when the preexisting one-second benchmark is one they readily meet. But since we already have concluded that there was no such preexisting benchmark, most of the force has gone out of petitioners' appeal to fairness.

To flesh it out, petitioners' fairness argument is that, in reasonable reliance on Lott 's one-second rule, they hired surveyors to identify target licensees and lawyers to file their finder's preference requests. Under the one-second rule, petitioners contend, they were entitled to finder's preferences. If the FCC is permitted to apply the new 1.6-kilometer benchmark, they will have borne the burden of those expenses for nothing.

If the petitioners truly did rely on a one-second benchmark, that reliance was badly misplaced and hence inappropriate for consideration under Clark-Cowlitz. See id. at 1084 (noting that reliance must be reasonable). There was no "well established practice" supporting a one-second benchmark. See id. at 1083. To the contrary, the status quo ante was not a benchmark at all, but rather a case-by-case assessment with a highly uncertain outcome. See, e.g., Lott, 9 F.C.C.R. at 225; Cassell, 11 F.C.C.R. at 16,723-24 & nn. 15-17. Indeed, Lott was the first finder's preference case to involve a deviation from geographic coordinates, and the Lott opinion was released only two months before petitioner Vaughn filed his preference application and only four months before petitioners Cassell and Kelley Communications filed theirs. Moreover, as the Report and Order made clear, the FCC always retained the "right to review preference requests to assure that the awarding of the preference [was] in the public interest...." Report and Order, 6 F.C.C.R. at 7303 n. 64. In short, petitioners' expenditure of funds on lawyers and surveyors was a gamble; it was not a sure bet. See Clark-Cowlitz, 826 F.2d at 1084 ("Although hope springs eternal, hope is no surrogate for reliance.").

[332 U.S.App.D.C. 165] If there were any parties in these cases who did have a reasonable reliance interest, they were the existing licensees rather than the petitioners. As the Commission's opinion suggests, the licensees had been operating their stations for years at what they thought, apparently in good faith, were the correct geographic coordinates. As far as the record reflects, no operator had ever before lost a license based on a deviation as small as those at issue here. Moreover, while petitioners' investment in surveyors and legal fees was minor, the burden the existing licensees would bear if the FCC revoked their licenses would be great. See id. As the Bureau's Licensing Division noted in making a similar point, "construction costs associated with a trunked Specialized Mobile Radio Station can amount to hundreds of thousands of dollars." Vaughn, 9 F.C.C.R. at 4439.

In sum, because there is no evidence of the kind of "manifest injustice" that would counsel against retroactive application of the 1.6-kilometer benchmark, Clark-Cowlitz, 826 F.2d at 1081 , petitioners' final attack on the denial of their preference requests falls short of the mark.

III

For the foregoing reasons, the petitions for review [7] are denied.

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1 Petitioners filed notices of appeal under 47 U.S.C. § 402(b)(1), rather than petitions for review under § 402(a). Four days after the notices were filed, we decided Freeman Engineering Associates v. FCC, 103 F.3d 169 (D.C.Cir.1997) , in which we held that the FCC's denial of an application for a "pioneer's preference" is reviewable under § 402(a) rather than § 402(b)(1). See id. at 176-77. In light of Freeman, all parties now agree that our jurisdiction over these cases arises under § 402(a). See FCC Br. at 3; Petitioners' Reply Br. at 1 n.1. Given the similarity between the two FCC preference programs, we agree as well. Accordingly, we will treat the notices of appeal as petitions for review, and will refer to the parties here as "petitioners."

2 Due to changes in the way it now awards licenses, the Commission has since discontinued the finder's preference program for the 800 and 900 MHz SMR spectrum, proposed eliminating the program for services in the 220-222 MHz spectrum, and suggested the possibility of eliminating it for all services. See generally In re Amendment of Part 90 Concerning the Commission's Finder's Preference Rules, 11 F.C.C.R. 13,016, 13,019-22 (1996). These changes, which apply only prospectively, do not affect the petitions for review currently before this court.

3 As petitioner Vaughn pointed out below, see J.A. at 77, one second of latitude is actually the equivalent of approximately 100 feet, while the length of one second of longitude varies depending upon one's proximity to the earth's poles. See also 7 THE NEW ENCYCLOPAEDIA BRITANNICA 184 (15th ed.1994).

4 Although petitioners do not say so expressly, their first, second, and fourth arguments ultimately are founded upon the requirement of the Administrative Procedure Act ("APA") that agency action not be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Their third argument is based on the APA's requirement that, with certain exceptions (including an exception for interpretive rules), agencies must provide "[g]eneral notice of proposed rulemaking," id. § 553(b), and an opportunity for interested persons "to participate in the rulemaking through submission of written data, views, or arguments," id. § 553(c).

5 In their brief, FCC counsel also contended that even if the Commission had departed from Lott, such a departure would be of no consequence because the Commission is not constrained "in any way" by the decisions of a subordinate division. FCC Brief at 29. As the Commission itself did not rely on such a contention in its opinion below, we will not consider it here. See Burlington Truck Lines v. United States, **371 U. S. Reports 156** , 168, 83 S.Ct. 239 , 9 L.Ed.2d 207 (1962) ; Securities & Exchange Comm'n v. Chenery Corp., **332 U. S. Reports 194** , 196, 67 S.Ct. 1575 , 91 L.Ed. 1995 (1947) . In any event, FCC counsel abandoned this contention during oral argument.

6 Quoting our earlier opinion in Retail, Wholesale & Department Store Union v. NLRB, 466 F.2d 380 , 390 (D.C.Cir.1972), Clark-Cowlitz set forth the following, non-exhaustive list of relevant factors:

(1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well-established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.

Clark-Cowlitz, 826 F.2d at 1081 .

7 See supra note 1.

EXHIBIT 37

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
CenturyLink Petition for Conversion of Average Schedule Affiliates to Price Cap Regulation and for Limited Waiver Relief	)	WC Docket No. 14-23
	)	
	)	

ORDER

Adopted: May 15, 2014 **Released: May 15, 2014**

By the Associate Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this Order we grant a waiver, to the extent indicated, to allow CenturyLink, Inc. ("CenturyLink") to convert its average schedule study areas to the regulatory requirements applicable to price cap carriers.[1] This waiver will further the public interest by providing the carrier incentives to maintain and promote more efficient operations and by accelerating the reduction of rates currently subject to intercarrier compensation reform.[2]

II. BACKGROUND

2. *Price Cap Conversion Orders Prior to the USF/ICC Transformation Order.* Beginning with the *Windstream Order*,[3] the Commission granted several waivers allowing price cap carriers to

[1] *See* Petition of CenturyLink, Inc. for Conversion of Average Schedule Affiliates to Price Cap Regulation and for Limited Waiver Relief WC Docket No. 14-23, at 1 (filed Jan. 31, 2014) (Petition); *CenturyLink, Inc. Petition For Conversion of Average Schedule Affiliates to Price Cap Regulation and for Limited Waiver Relief*, WC Docket No. 14-23, Public Notice, DA 14-172 (Wireline Comp. Bur. rel. Feb. 10, 2014).

[2] As discussed herein, any waivers granted in this order are subject to any future reforms or rule revisions regarding intercarrier compensation, regulation of special access services, price cap regulation, or universal service requirements that the Commission may adopt in the future. *See, e.g., Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (2011) (*USF/ICC Transformation Order*), *pets. for review pending sub nom. In re: FCC 11-161*, No. 11-9900 (10th Cir. filed Dec. 8, 2011); *Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, 27 FCC Rcd 10557 (2012) (*Special Access R&O*).

[3] *Windstream Petition for Conversion to Price Cap Regulation and for Limited Waiver Relief*, WC Docket No. 07-171, Order, 23 FCC Rcd 5294 (2008) (*Windstream Order*); *see also Petition of Virgin Islands Telephone Corporation for Election of Price Cap Regulation and for Limited Waiver of Pricing and Universal Service Rules*, WC Docket No. 10-39; *China Telephone Company, FairPoint Vermont, Inc., Maine Telephone Company, Northland Telephone Company of Maine, Inc., Sidney Telephone Company, and Standish Telephone Company Petition for Conversion to Price Cap Regulation and for Limited Waiver Relief*, WC Docket No. 10-47; *Petition of Windstream for Limited Waiver Relief*, WC Docket No. 10-55, Order, 25 FCC Rcd 4824 (Wireline Comp. Bur. 2010); *CenturyTel, Inc., Petition for Conversion to Price Cap Regulation and Limited Waiver Relief*, WC Docket (continued....)

convert their cost company[4] study areas to price cap regulation under the *CALLS* regulatory model.[5] Under that model, carriers were required to establish initial Price Cap Indexes (PCIs) for their price cap baskets using the rates in effect on January 1 of the conversion year and the demand from the preceding year;[6] required to target their average traffic-sensitive (ATS) rates to the appropriate target ATS rates pursuant to section 61.3(qq) of the Commission's rules, using an X-factor of 6.5 percent;[7] and allowed to continue to receive Interstate Common Line Support (ICLS) on a frozen per-line basis for the converted study areas.[8] Carriers were also required to forego any recovery of a presubscribed interexchange carrier charge (PICC) or carrier common line (CCL) charge and forego assessing a $7.00 non-primary residential line subscriber line charge (SLC).[9] Carriers withdrawing cost companies from the National Exchange Carrier Association (NECA) pool were required to employ a cost study based on the previous calendar year's cost and demand data to establish new initial price cap rates.[10]

3. *USF/ICC Transformation Order.* On November 18, 2011, the Commission released the *USF/ICC Transformation Order*[11], which, among other things, established new rules requiring carriers to adjust, over a period of years, many of their switched access charges effective on July 1st of each year, with the ultimate goal of transitioning to a bill-and-keep regime. As an initial matter, the Commission capped the vast majority of interstate and intrastate switched access rates as of December 29, 2011, and price cap carriers were required to remove their switched access services from the traffic-sensitive and trunking baskets.[12] Price cap and rate-of-return carriers were required to make reductions to certain intrastate switched access rates in 2012 and 2013 if specified criteria were met.[13] Beginning in 2014, price cap and rate-of-return carriers begin a series of rate reductions to transition certain terminating

(Continued from previous page)
No. 08-191, Order, 24 FCC Rcd 4677 (Wireline Comp. Bur. 2009); *ACS of Alaska, Inc., ACS of Anchorage, Inc., ACS of Fairbanks, Inc. and ACS of the Northland, Inc., Petition for Conversion to Price Cap Regulation and Limited Waiver Relief,* WC Docket No. 08-220, Order, 24 FCC Rcd 4664 (Wireline Comp. Bur. 2009); *Petition of Puerto Rico Telephone Company, Inc. for Election of Price Cap Regulation and Limited Waiver of Pricing and Universal Service Rules*, WC Docket No. 07-292; *Consolidated Communications Petition for Conversion to Price Cap Regulation and for Limited Waiver Relief,* WC Docket No. 07-291; *Frontier Petition for Limited Waiver Relief upon Conversion of Global Valley Networks, Inc., to Price Cap Regulation*, WC Docket No. 08-18, Order, 23 FCC Rcd 7353 (Wireline Comp. Bur. 2008).

[4] A cost company is a rate-of-return carrier that determines its rates based on its own costs, as opposed to determining its costs based on average schedule formulas. *See, e.g., Windstream Order*, 23 FCC Rcd at 5298, para. 5 n.16. By contrast, an average schedule company is a rate-of-return company that determines its costs based on formulas approved by the Commission that are designed to produce disbursements that would be received based on the costs of a company that is representative of average schedule companies. *See* 47 C.F.R. § 69.606.

[5] *Access Charge Reform*, CC Docket No. 96-262; *Price Cap Performance Review for Local Exchange Carriers*, CC Docket No. 94-1; *Low-Volume Long-Distance Users*, CC Docket No. 99-249; *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket No. 96-45, 15 FCC Rcd 12962 (2000) (*CALLS Order*) (subsequent history omitted).

[6] *See, e.g., Windstream Order,* 23 FCC Rcd at 5299-5301, paras. 11-14.

[7] *See, e.g., id.* at 5301, paras. 15-16.

[8] *See, e.g., id.* at 5302-04, paras. 19-22.

[9] *See, e.g., id.*

[10] *See, e.g., id.* at 5295, para. 3 n.4.

[11] *See USF/ICC Transformation Order*, 26 FCC Rcd 17663.

[12] *See* 47 C.F.R. §§ 51.907(a), 51.909(a).

[13] *See* 47 C.F.R. §§ 51.907(b)-(c), 51.909(b)-(c).

interstate and intrastate switched access rates to bill-and-keep.[14] The price cap transition occurs over six years and the rate-of-return transition occurs over nine years.[15]

4. The Commission also adopted a transitional recovery mechanism to mitigate the impact of reduced intercarrier revenues on carriers and to facilitate continued investment in broadband infrastructure, while providing greater certainty and predictability going forward than the *status quo*.[16] As part of the transitional recovery mechanism, the Commission defined as "Eligible Recovery" the amount of intercarrier compensation revenue reductions that incumbent LECs would be eligible to recover through a combination of end-user charges (the Access Recovery Charge (ARC)) and, where eligible and if a carrier elects to receive it, intercarrier compensation replacement Connect America Fund support.[17] A carrier's Eligible Recovery is based on a percentage of the reduction in revenue each year resulting from the intercarrier compensation reform transition.[18] The precise percentages and the calculation methods vary between price cap and rate-of-return carriers, with the price cap methodology providing a faster reduction in recovery over time.

5. Price cap and rate-of-return LECs with Eligible Recovery were permitted to assess an ARC on consumers in the form of a monthly fixed charge beginning on July 3, 2012.[19] Subject to certain identical limitations, the Commission allowed an annual residential and single-line business ARC rate increase of $0.50 and an annual multi-line business ARC rate increase of $1.00. Price cap LECs are allowed to make five such increases, and rate-of-return LECs may make six such increases.[20] If an incumbent LEC cannot recover its entire Eligible Recovery through ARCs and is otherwise eligible, it may opt to receive the remainder from intercarrier compensation replacement Connect America Fund support.[21] Intercarrier compensation replacement Connect America Fund support for price cap LECs phases out over three years beginning in 2017.[22]

6. In the *USF/ICC Transformation Order*, the Commission also revised the rules governing high cost support for price cap LECs. Specifically, the Commission froze all forms of universal service support for price cap carriers.[23] Under these revised rules, rate-of-return carriers affiliated with holding companies for which the majority of access lines are regulated under federal price caps are treated as price cap carriers for the purpose of calculating their frozen high cost support.[24]

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[14] *See* 47 C.F.R. §§ 51.907(d), 51.909(d).

[15] *See* 47 C.F.R. §§ 51.907, 51.909.

[16] *USF/ICC Transformation Order,* 26 FCC Rcd at 17677, para. 36. In adopting the recovery mechanism, the Commission explained that it did so in large part "to provide predictability to incumbent carriers that had been receiving implicit ICC subsidies [and] to mitigate marketplace disruption during the reform transition. . . ." *Id.* at 17962-63, para. 858.

[17] *Id.* at 17957, para. 850. In determining how the transitional recovery should be funded, the Commission concluded that "it is appropriate to first look to customers paying lower rates for some limited, reasonable recovery, and adopt[ed] a number of safeguards to ensure that rates remain affordable and that consumers are not required to contribute an inequitable share of lost intercarrier revenues." *Id.*

[18] Id. at 17957-58, para. 851.

[19] *USF/ICC Transformation Order*, 26 FCC Rcd at 17957, para. 850; *July 3, 2012 Annual Access Charge Tariff Filings*, WCB/Pricing File No. 12-07, Order, 27 FCC Rcd 2981, 2982, para. 3 (Wireline Comp. Bur. 2012).

[20] 47 C.F.R. § 51.917(e).

[21] 47 C.F.R. §§ 51.915(f), 51.917(f).

[22] 47 C.F.R. § 51.915(f)(3)-(5).

[23] 47 C.F.R. § 54.312(a).

[24] *Id.*

7. *2012 Average Schedule Conversion Order.* In the *2012 Average Schedule Conversion Order*, the Commission granted a waiver permitting several carriers to withdraw their average schedule study areas from the NECA common line and traffic-sensitive access tariffs and convert them to price cap regulation.[25] In that order, the Commission waived certain of its rules to allow each involved carrier to establish a single interstate access tariff for its average schedule study areas exiting the NECA interstate tariffs and approved a methodology for establishing initial interstate switched and special access rates using NECA switched and special access rates adjusted to reflect the extent the exiting study areas were either a net contributor to, or a net recipient from, the NECA traffic-sensitive pool.[26] The Commission concluded that the switched access rates developed using this methodology would be deemed to be the rates that are capped by section 51.907(a).[27] For special access services, the Commission required the carriers to file supporting materials establishing PCIs using the same methodology.[28] The *2012 Average Schedule Conversion Order* also noted that average schedule companies that convert to price cap methodology will become subject to the price cap transition rules in section 51.907 and to the price cap recovery rules for non-CALLS study areas set forth in section 51.915 of the Commission's rules.[29]

8. *CenturyLink's Petition.* On January 31, 2014, CenturyLink filed a waiver petition requesting authority to convert CenturyTel of Chester, Inc., CenturyTel of Postville, Inc., and CenturyTel of the Midwest-Wisconsin Region (collectively referred to as "CenturyLink Average Schedule Affiliates") to price cap regulation effective July 1, 2014.[30] Concurrently, CenturyLink would withdraw the CenturyLink average schedule affiliates from the NECA access tariffs. CenturyLink proposes that the conversion be subject to the price cap regulatory structure established in the *CALLS Order*, the *USF/ICC Transformation Order* and the *2012 Average Schedule Conversion Order*.[31] CenturyLink indicates that it will establish a single interstate access tariff with blended switched and special access rates for the three study areas and will develop switched and special access rates using the net-contribution approach employed in the *2012 Average Schedule Conversion Order*. CenturyLink states that approval of the waiver is in the public interest,[32] would provide CenturyLink administrative efficiencies by allowing it to be regulated entirely as a price cap company,[33] and would not have any impact on the CenturyLink Average Schedule Affiliates' Connect America Funding.[34] No comments were filed on CenturyLink's petition.

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[25] *Joint Petition of Price Cap Holding Companies for Conversion of Average Schedule Affiliates to Price Cap Regulation and for Limited Waiver Relief; Consolidated Communications Companies Tariff F.C.C. No. 2; Frontier Telephone Companies Tariff F.C.C. No. 10; Windstream Telephone Systems Tariff F.C.C. No. 7*, Order, 27 FCC Rcd 15753 (2012) (*2012 Average Schedule Conversion Order*). The *2012 Average Schedule Conversion Order* approved a two-step process: first the carriers withdraw from the NECA tariff and establish their own interstate access rates under rate-of-return regulation, and then convert to the price cap regulatory structure on January 1, 2013. The summary reflects the process as if it had been a single step process.

[26] *Id.* at 15760-61, para. 17.

[27] *Id.*

[28] *Id.* at 15761, para. 18

[29] *Id.* at 15763-64, para. 28.

[30] *See* Petition at 1.

[31] *See id.* at 2-3.

[32] *See id.* at 1.

[33] *Id.* at 3.

[34] *Id.* at 14.

III. DISCUSSION

A. Conversion to Price Cap Regulation Is in the Public Interest

9. We find that good cause exists to grant, to the extent described below, a waiver to permit CenturyLink to convert, according to its proposed transition plan, its average schedule study areas to price cap regulation on July 1, 2014.[35] Petitioners seek to take advantage of the opportunities provided by section 61.41(a)(3) of the Commission's rules, the *Windstream Order*, and the *2012 Average Schedule Conversion Order* to convert their average schedule study areas to price cap regulation.[36] Specifically, for interstate switched access charges, Petitioners propose to cap switched access rates in accordance with section 51.907(a) and to adopt the shorter price cap transition timetable and the price cap recovery mechanism rather than the procedures applicable to rate-of-return carriers.[37] Petitioners will continue to receive Connect America Fund support as price cap carriers and will establish PCIs for their interstate special access services in a manner consistent with the approach specified in the *2012 Average Schedule Conversion Order*.[38]

10. As an initial matter, we find that the request presented by CenturyLink offers the public interest benefits generally attributed to incentive regulation – specifically, they provide incentives for the carrier to become more efficient, innovative, and productive.[39] In 1990, the Commission concluded that incentive-based regulation is preferable to rate-of-return regulation, finding that several benefits would flow from the adoption of price cap regulation, including incentives for carriers to become more productive, innovative, and efficient.[40] The Commission also found that price cap regulation is likely to benefit consumers directly or indirectly through lower access prices. More recently, in the *USF/ICC Transformation Order*, the Commission restated the benefits of price cap regulation and again encouraged carriers to convert from rate-of-return to price cap regulation.[41] Rather than detailing a rule to govern such conversions, however, the Commission noted that future conversions from rate-of-return regulation to price cap regulation would be addressed through the waiver process.[42]

11. Grant of the waiver requested here will also facilitate the achievement of Commission policies. Among other things, price cap carriers' terminating End Office Access Service rates will transition to bill-and-keep by July 1, 2017, three years before rate-of-return carriers' terminating End Office Access Service rates will complete such transition.[43] Price cap carriers also must, under certain

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[35] Generally, the Commission's rules may be waived for good cause shown. 47 C.F.R. § 1.3. The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest. *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*). In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166. Waiver of the Commission's rules is therefore appropriate only if special circumstances warrant a deviation from the general rule, and such deviation will serve the public interest. *Northeast Cellular*, 897 F.2d at 1166.

[36] 47 C.F.R. § 61.41(a)(3).

[37] *Id.* at 13.

[38] 47 C.F.R. § 61.41(a)(3).

[39] *See Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd at 6790, para. 31 (1990).

[40] *Id.*

[41] *USF/ICC Transformation Order*, 26 FCC Rcd at 17940, para. 814.

[42] *Id.*

[43] *See* 47 C.F.R. §§ 51.907(f), 51.909(i).

conditions, reduce their terminating tandem switched rates to bill-and-keep on July 1, 2018.[44] The rate reductions for price cap carriers under section 51.907 reduces terminating switched access rates of price cap carriers more quickly than section 51.909 reduces the comparable rates for rate-of-return carriers, with Connect America funding phasing out over three years for price cap carriers beginning in 2017. These procedures for interstate switched access services and the capping of special access rates under the current price cap structure will ensure that these rates remain reasonable while affording petitioners the opportunity to benefit from incentive regulation. We further note that because the holding company of CenturyLink is already regulated pursuant to price cap regulation, the CenturyLink Average Schedule Affiliates' Connect America funding support is already calculated as if it were price cap regulated, and therefore, grant of this Petition will not impact Connect America funding. We emphasize that the relief granted in this Order is subject to any future reforms or rule revisions regarding intercarrier compensation, the regulation of special access services, price cap regulation, or universal service requirements that the Commission may adopt in the future.[45]

B. Transition to Price Caps

12. Above, we determined that the public interest would be served if CenturyLink was allowed to convert its average schedule study areas to price cap regulation on July 1, 2014. This will require CenturyLink to take certain steps to comply with price cap regulations and the intercarrier compensation rules applicable to price cap regulated carriers, which we outline in the following paragraphs.

13. In its petition, consistent with the approach approved in the *2012 Average Schedule Conversion Order*, CenturyLink proposes to use annualized settlement data at an 11.25 percent rate-of-return period for the period from January 1, 2013, through June 30, 2013, and the associated annualized demand to develop a single set of blended interstate switched access rates that reflect the extent to which the carriers are net contributors to the NECA pool.[46] CenturyLink states that these would be the rates it would adjust to develop rates for the CenturyLink Average Schedule Affiliates' initial traffic-sensitive access tariff filing. CenturyLink requests that the Commission deem these adjusted rates to be the December 29, 2011 rates for the CenturyLink Average Schedule Affiliates that are capped by section 51.907(a).[47] We find that this approach is consistent with the *2012 Average Schedule Order*, and therefore, we find it reasonable for CenturyLink to use annualized settlement data at an 11.25 percent rate of return for the period from January 1, 2013 through June 30, 2013, and associated annualized demand to develop switched access rates. This process allows CenturyLink to develop the amount of its net contribution to the NECA traffic-sensitive pool for switched access services. The amount of the net contribution associated with switched access then allows CenturyLink to establish reduced switched access rates reflecting that contribution. The switched access rates developed using this methodology will be deemed to be the December 29, 2011 rates that are capped by section 51.907(a), and we accordingly waive that section to the extent indicated herein.[48]

14. Consistent with the *2012 Average Schedule Order*, CenturyLink proposes to use the same net-contribution process described above to calculate special access tariff rates.[49] We agree and conclude

[44] 47 C.F.R. § 51.907(b).

[45] *See, e.g., USF/ICC Transformation Order*, 26 FCC Rcd at 17663; *Special Access R&O*, 27 FCC Rcd at 10557.

[46] *See* Petition at 4. In addition, section 51.909(a)(4) of the Commission's rules establishes a methodology that requires NECA to adjust its switched access rate caps upon carriers entering and exiting the NECA pool. 47 C.F.R. § 51.909(a)(4).

[47] *See* Petition at 5.

[48] 47 C.F.R. § 51.907(a). We note that the capped terminating end office rates will begin to be reduced as of July 1, 2014. 47 C.F.R. § 51.907(d).

[49] CenturyLink Petition at 6-7.

that CenturyLink should calculate their special access rates using the annualized settlement data at an 11.25 percent rate of return for the period from January 1, 2013, through June 30, 2013. As the Commission concluded in the *2012 Average Schedule Conversion Order*, using a common period of measurement for establishing both switched and special access rates avoids possible rate distortions because of changes that may have occurred in average schedule formulas from one year to the next.[50]

15. As part of the transition, CenturyLink proposes to issue a revised tariff for CenturyLink Operating Companies Tariff No. 6 to include CenturyTel of Chester, Inc., CenturyTel of Postville, Inc., and CenturyTel of the Midwest-Wisconsin (Wayside) using the methodology to establish rates discussed above.[51] CenturyLink would use a blended rate for all three companies.[52] According to CenturyLink, in the new interstate tariff, common line rates would be set to equal the existing rates in NECA Tariff FCC No. 5 adjusted according to the 2014 annual filing price cap rules that will then be applicable.[53] Effective the same date, the CenturyLink Average Schedule Affiliates would withdraw from the NECA pools.[54] We agree with CenturyLink's proposal and direct CenturyLink to file those tariffs pursuant to the 2014 Annual Access Charge Tariff Filing with a July 1, 2014 effective date along with the relevant Tariff Review Plan (TRPs) spreadsheets required in the filing.[55]

16. CenturyLink must file supporting materials establishing initial PCIs for special access service. Pursuant to the methodology outlined in the *2012 Average Schedule Order*, CenturyLink should use the special access rates developed pursuant to the above procedures and the appropriate 2013 demand to develop its PCI for the special access basket.[56] Under the special circumstances presented by these average schedule study areas leaving the NECA pool, we find that those special access rates and demand are the appropriate rates and demand to use in setting initial PCIs for the special access basket.[57] As in previous conversions to price cap regulation under the *CALLS* rules, there is no requirement for further reductions in the special access PCI.[58] Consistent with the Commission's price cap rules, the CenturyLink Average Schedule Affiliates must establish Actual Price Indexes, service categories, and Service Band Indexes for the special access basket.

17. Beginning July 1, 2014, the CenturyLink Average Schedule Affiliates will become subject to the price cap transition rules in section 51.907 and to the price cap recovery rules for non-*CALLS* study areas set forth in section 51.915.[59] Thus, CenturyLink will need to file TRP worksheets for

[50] *2012 Average Schedule Order*, 27 FCC Rcd at 15761, para. 18.

[51] *Id.* at 7-8.

[52] *Id.*

[53] *Id.*

[54] *Id.* We note that CenturyLink requested a waiver if needed of section 69.3(i) to permit them to notify NECA of the CenturyLink Average Schedule Affiliates' withdrawal from the Association tariff within thirty (30) days after a Commission order granting this Petition. CenturyLink Petition at 6. Because CenturyLink timely notified NECA of its withdrawal from its tariff by March 1, 2014, no waiver is needed. *See* Letter from Jennifer Leonard, Director, Access Tariffs and Costs, to Julie Veach, Chief, Wireline Competition Bureau (filed March 10, 2014).

[55] *See July 1, 2014 Annual Access Charge Tariff Filings*, WC Docket No. 14-48, Order, DA 14-404 (Pricing Pol. Div. rel. Mar. 25, 2014); *Material to be Filed in Support of 2014 Annual Access Tariff Filings*, WC Docket No. 14-48, Order, DA 14-494 (Pricing Pol. Div. rel. Apr. 15, 2014) (*TRP Order*). In addition, as CenturyLink notes in its Petition, it will also need to file new intrastate tariff filings because it is likely that the new rates for the CenturyLink Average Schedule Affiliates will be lower than the previous rates. CenturyLink Petition at 8.

[56] *2012 Average Schedule Order*, 27 FCC Rcd at 15763, para. 27.

[57] *Id.*

[58] *See* 47 C.F.R. § 61.45(b)(1)(iv).

[59] 47 C.F.R. § 51.915.

the 2014 Annual Access Tariff Filing reflecting the election of price cap regulation following the recovery procedures set forth in section 51.915(d)(1)(iii).[60] The demand that the CenturyLink Average Schedule Affiliates shall use in calculating its Eligible Recovery in future years should be the relevant demand associated with the development of its Base Period Revenue. The CenturyLink Average Schedule Affiliates may not assess a non-primary Residential SLC or a PICC, consistent with previous price cap conversions.[61]

IV. ORDERING CLAUSES

18. Accordingly, IT IS ORDERED, pursuant to sections 4(i), 201-203, and 254(g) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 201-203, and 254(g), that the petition for waiver file by CenturyLink IS GRANTED to the extent described herein.

19. IT IS FURTHER ORDERED that this order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Deena M. Shetler
Associate Chief
Wireline Competition Bureau

[60] 47 C.F.R. § 51.915(d)(1)(iii); *see also TRP Order*.

[61] *See, e.g., Windstream Order*, 23 FCC Rcd at 5302-04, paras. 19-22.

EXHIBIT 38

826 F.2d 1074

264 U.S.App.D.C. 58

CLARK-COWLITZ JOINT OPERATING AGENCY, Petitioner,
v.
FEDERAL ENERGY REGULATORY COMMISSION, Respondent,
People of the State of California, et al., Pacific Power & Light Company, Edison Electric Institute, Sacramento Municipal Utility District, et al., Pacific Gas & Electric Company, Public Utility Commissioner of the State of Oregon, Washington State Department of Fisheries, et al., American Paper Institute, Inc., City of Santa Clara, California, et al., American Public Power Association, Intervenors.

No. 83-2231.

United States Court of Appeals,
District of Columbia Circuit.

Argued En Banc March 31, 1986.
Decided Aug. 11, 1987.

Petition for Review of an Order of the Federal Energy Regulatory commission.

Christopher D. Williams, with whom Robert L. McCarty and George H. Williams, Jr., Washington, D.C., were on the brief, for petitioner.

Jerome M. Feit, Sol., F.E.R.C., with whom William H. Satterfield, Gen. Counsel, Joseph S. Davies and John N. Estes, III, Attys., F.E.R.C. were on the brief, for respondent. Arlene P. Groner, Atty., F.E.R.C., Washington, D.C., also entered an appearance for respondent.

Thomas H. Nelson, Portland, Or., for intervenor, Pacific Power & Light Co., Hugh Smith, Portland, Or., also entered an appearance for intervenor.

Janice E. Kerr, J. Calvin Simpson and Peter G. Fairchild, San Francisco, Cal., were on the brief for intervenors, People of the State of California, et al.

James B. Liberman, Ira H. Jolles and Peter B. Kelsey, Washington, D.C., were on the brief for intervenor, Edison Elec. Institute.

Robert C. McDiarmid, Daniel I. Davidson, Frances E. Francis, Ben Finkelstein, G. Philip Nowak and Charles H. Cochran, Washington, D.C., were on the joint brief for public intervenors, Sacramento Mun. Utility Dist., et al.

Robert Ohlbach and Jack F. Fallin, Jr., San Francisco, Cal., were on the brief for intervenor, Pacific Gas & Elec. Co. Malcolm H. Furbush, San Francisco, Cal., also entered an appearance, for intervenor.

W. Benny Won, Salem, Or., was on the brief for intervenor, Public Utility Commissioner of Oregon.

Rigdon H. Boykin, New York City, was on the brief for intervenor, American Paper Institute, Inc.

Richard K. Willard, Asst. Atty. Gen. and Michael Kimmel, Atty., Dept. of Justice, Washington, D.C., were on the brief for amicus curiae, U.S., urging affirmance.

James M. Johnson, Olympia, Wash., entered an appearance for intervenor, Washington State Dept. of Fisheries, et al.

Frederick H. Ritts, Washington, D.C., entered an appearance for intervenor, American Public Power Ass'n.

Before ROBINSON, MIKVA, EDWARDS, RUTH B. GINSBURG, BORK, SCALIA [*] , STARR and

BUCKLEY, Circuit Judges, and WRIGHT [**] , Senior Circuit Judge.

Opinion for the Court filed by Circuit Judge STARR.

Dissenting opinion filed by Circuit Judge MIKVA, with whom Circuit Judges ROBINSON and EDWARDS join.

STARR, Circuit Judge:

This case involves a contest for a license to operate a hydroelectric power plant in the Pacific Northwest. The legal issues generated by the contest, however, far transcend the question of which of two competitors will win the right to operate the plant in question. To the contrary, the case involves fundamental issues of the power of an administrative agency to change its interpretation of law and to take regulatory action based upon that new interpretation.

The specific issue before us is whether in competing for a license, a public entity, the Clark-Cowlitz Joint Operating Agency, was entitled to the municipal (and State) preference prescribed in section 7(a) of the Federal Power Act, 16 U.S.C. Sec. 800(a) (1982). [1] The Federal Energy Regulatory Commission determined that Congress did not intend the statutorily prescribed municipal preference to apply in relicensing proceedings in which, as here, the incumbent licensee was competing for the license. In reaching this determination, however, FERC overruled its contrary conclusion articulated only three years earlier in declaratory proceedings in which both Clark-Cowlitz and the incumbent licensee, Pacific Power & Light Company, participated.

The petitioner here, Clark-Cowlitz, contends that the Commission acted unlawfully in accomplishing this about-face as to parties who participated in the earlier declaratory proceedings. Initially, we are called upon to decide whether principles of preclusion or retroactivity bar FERC from applying its reinterpretation of section 7(a) in the contest between Clark-Cowlitz and Pacific Power. If we conclude that FERC is not barred, then we must consider whether FERC's new interpretation is permissible under the principles enunciated in Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., **467 U. S. Reports 837** , 104 S.Ct. 2778 , 81 L.Ed.2d 694 (1984) . See also Immigration & Naturalization Service v. Cardoza-Fonseca, --- U.S. ----, 107 S.Ct. 1207 , 94 L.Ed.2d 434 (1987) . For the reasons that follow, we hold that FERC was not precluded from applying its new interpretation of section 7(a) in the present proceeding. We also uphold its interpretation as reasonable and consistent with Congressional intent. One aspect of the Commission's substantive analysis, however (apart from statutory interpretation), falls short of the standards of reasoned decision making and thus requires a remand of the case to the agency.

I

The relevant facts can be briefly stated. Pacific Power & Light Company is the incumbent licensee of the Merwin Hydroelectric Power Project. That facility is situated on the Lewis River in

the State of Washington, between the Counties of Clark and Cowlitz. Pacific Power has owned, operated, and maintained the Merwin

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project since 1941, when Pacific Power's predecessor transferred the 50-year license originally issued in 1929 for the project to the investor-owned utility. Anticipating the looming expiration of the original license, Pacific Power filed an application for a new license in 1976. Shortly thereafter, public utility districts in Clark and Cowlitz Counties formed the Clark-Cowlitz Joint Operating Agency to compete for the Merwin license. Clark-Cowlitz filed its competing application in 1977, claiming the benefit of the municipal preference of section 7(a).

At that time, the original licenses for many other hydroelectric projects were likewise about to expire. A common issue arose as to whether States and municipalities contending for new licenses at the various projects could claim the benefit of section 7(a)'s municipal preference when incumbent licensees also sought new licenses for the projects. In view of the recurring nature of this issue, FERC decided to address the question in a declaratory order proceeding. See 5 U.S.C. Sec. 554(e) (1982). Numerous parties, including Clark-Cowlitz and Pacific Power, intervened and participated in that proceeding. Then, in an opinion issued in 1980, FERC concluded that the section 7(a) municipal preference applied in all relicensing proceedings, including those in which incumbent licensees were competing to maintain authority to operate their respective projects. City of Bountiful, 11 F.E.R.C. p 61,337, at 61,706, reh'g denied, 12 F.E.R.C. p 61,179, at 61,459 (1980).

Not surprisingly, FERC's decision failed to win universal acclaim. No less than thirty-eight petitioners appealed the agency's decision in the Bountiful declaratory order proceeding to the Eleventh Circuit. That court reviewed FERC's interpretation of section 7(a) under the deferential standard that " 'the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong.' " Alabama Power Co. v. FERC, 685 F.2d 1311 , 1318 (11th Cir.1982) (quoting CBS, Inc. v. FCC, **453 U. S. Reports 367** , 382, 101 S.Ct. 2813 2823, 69 L.Ed.2d 706 (1981)), cert. denied, **463 U. S. Reports 1230** , 103 S.Ct. 3573 , 77 L.Ed.2d 1415 (1983) . Under this standard of "great deference," the court upheld FERC's interpretation as "consistent with the statute's language, structure, scheme, and available legislative history." Id. [2] The Eleventh Circuit's opinion issued in September 1982.

As the Bountiful litigation proceeded in Atlanta, however, back in Washington, D.C., FERC was busily re-evaluating its stance on the applicability of the municipal preference. The Commission ultimately concluded that its Bountiful interpretation was contrary to Congressional intent, and that the preference did not apply when, in addition to a state or municipal applicant, the incumbent licensee sought a new license for an existing project. The first notice of this reassessment appeared in a brief filed by the Solicitor General in the United States Supreme Court on the petition for certiorari in Alabama Power. See Brief for the Federal Energy Regulatory Commission on Petitions for a Writ of Certiorari at 8-9, Utah Power & Light Co. v. FERC, **463 U. S. Reports 1230** , 103 S.Ct. 3573 , 77 L.Ed.2d 1415 (1983) , Joint Appendix ("J.A.") at 95, 106-07. There, the Solicitor General urged the Court, in light of FERC's reinterpretation, to grant the petitions and remand the case to the Eleventh

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Circuit. The Court, however, declined the invitation and denied certiorari. Utah Power & Light Co. v. FERC, **463 U. S. Reports 1230** , 103 S.Ct. 3573 , 77 L.Ed.2d 1415 (1983) .

At this juncture in the rather baroque history of the municipal preference issue, we return from the Bountiful litigation and rejoin Clark-Cowlitz in its efforts before the Commission to secure the Merwin license. Following FERC's decision in Bountiful, Clark-Cowlitz, along with numerous applicants for licenses at other sites, pressed FERC to begin hearings on individual projects. As luck would have it, hearings on the Merwin relicensing were the first out of the gate; indeed,

those hearings got underway only three days after the Eleventh Circuit affirmed Bountiful. To Clark-Cowlitz's chagrin, however, in ultimately ruling on the Merwin applications, FERC formally announced its change of mind signalled in the Solicitor General's brief before the Supreme Court. The Commission expressly overruled Bountiful and awarded the license to Pacific Power, the delighted incumbent. Pacific Power & Light Co., 25 F.E.R.C. p 61,052, at 61,174, reh'g denied, 25 F.E.R.C. p 61,290 (1983) [hereinafter Merwin].

In addition to repudiating Bountiful, FERC went on to evaluate the specific plans of the two contestants for the Merwin license. The Commission found that even under Bountiful the municipal preference would not obtain in the Merwin proceedings because Clark-Cowlitz's and Pacific Power's plans were not "equally well adapted," the statutory condition precedent to applying the preference. See supra note 1. The Commission based this finding on the relative economic impact of awarding the license to one contestant or the other. Specifically, the Commission determined that Pacific Power would incur greater costs in securing an alternative to Merwin Project power than would Clark-Cowlitz. Under this analysis, Pacific Power's customers, in the aggregate, would therefore suffer more if the incumbent lost the license than Clark-Cowlitz's would gain were Clark-Cowlitz to receive it. This meant, as FERC saw it, that Pacific Power's plans for operating Merwin were better adapted to "utilize in the public interest the water resources of the region." 16 U.S.C. Sec. 800(a) (1982) see supra note 1.

Clark-Cowlitz thereupon brought this appeal. See 16 U.S.C. Sec. 825l(b). While the appeal was pending, Congress amended section 7(a) of the Federal Power Act to eliminate the municipal preference in all relicensings except the Merwin proceedings. Electric Consumers Protection Act of 1986 (ECPA), Pub. L. No. 99-495, Secs. 2, 11, **100 Stat. 1243** , 1255. [3] What had thus shaped up in this litigation as a major confrontation between the advocates of public power projects, on the one hand, and the champions of private (albeit regulated) enterprise on the other, reduced on the surface to an important but nonetheless parochial struggle over the license rights to a particular project. But Congress' amendment of the statutory prescription governing new licenses for existing projects, by keeping alive the Merwin controversy, did nothing to resolve the fundamental question as to an agency's ability to change its mind about the law and to act upon its new interpretation. It is to that bedrock issue of administrative law, brought into sharp relief by this case, that we now turn.

II

Clark-Cowlitz's primary argument is that principles of res judicata or collateral

estoppel bar FERC from applying its present interpretation of section 7(a) in the struggle between the two contestants. Clark-Cowlitz reasons that FERC is bound by the interpretation embraced in the Bountiful declaratory proceeding, to which both contestants for the Merwin license were parties (as intervenors).

For us to resolve this issue, it is unnecessary to plumb the depths of res judicata and collateral estoppel and their modern avatars, claim preclusion and issue preclusion. They have received lengthy expatiation elsewhere. See, e.g., Migra v. Warren City School District Board of Education, **465 U. S. Reports 75** , 77 n. 1, 104 S.Ct. 892 , 984, n. 1, 79 L.Ed.2d 56 (1984) ; Nevada v. United States, **463 U. S. Reports 110** , 128-31, 103 S.Ct. 2906 , 2917-19, 77 L.Ed.2d 509 (1983) ; Synanon Church v. United States, 820 F.2d 421 , 424-25, 426-27 (D.C.Cir.1987); Carr v. District of Columbia, 646 F.2d 599 (D.C.Cir.1980) ; 18 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure Secs. 4401-4478 (1981). Suffice it to say that, in general, these doctrines are designed to invest judicial resolutions of legal controversies with finality. See, e.g., Montana v. United States, **440 U. S. Reports 147** , 153-54, 99 S.Ct. 970 , 973-74, 59 L.Ed.2d 210 (1979) . Examined in light of preclusion principles, Clark-Cowlitz's argument is flawed in two fatal respects.

First. Whether it travels under the rubric of issue or claim preclusion, Clark-Cowlitz's argument fails because it misreads the Eleventh Circuit's decision as having conclusively determined the same issue (or claim) that confronts us. A fundamental requisite of issue preclusion is an identity of the issue decided in the earlier action and that sought to be precluded in a later action. Similarly, to preclude a party's raising a claim, it must be shown that the claim was (or could have been) raised in a prior proceeding. See, e.g., Gould v. Mossinghoff, 711 F.2d 396 , 398-99 (D.C.Cir.1983); see also Jack Faucett Associates, Inc. v. American Telephone & Telegraph Co., 744 F.2d 118 , 124 (D.C.Cir.1984), cert. denied, **469 U. S. Reports 1196** , 105 S.Ct. 980 , 83 L.Ed.2d 982 (1985) . The Second Restatement of Judgments makes clear the importance of these related requirements:

The principle underlying the rule of claim preclusion is that a party who once has had a chance to litigate a claim before an appropriate tribunal usually ought not to have another chance to do so. A related but narrower principle--that one who has actually litigated an issue should not be allowed to relitigate it--underlies the rule of issue preclusion.

Restatement (Second) of Judgments at 6 (1982) (emphasis added); see also Montana v. United States, **440 U. S. Reports 153** , 99 S.Ct. at 973 .

In the case at hand, the Eleventh Circuit neither addressed nor had the opportunity to address the specific issue (or claim) before us, namely the propriety of FERC's present, anti-Bountiful view that the municipal preference does not obtain in relicensings to which the incumbent licensee is a party. See I.A.M. National Pension Fund v. Industrial Gear Manufacturing Co., 723 F.2d 944 , 947-49 (D.C.Cir.1983) (preclusion does not attach to issues not necessarily litigated or claims that could not have been raised in earlier proceeding). The Eleventh Circuit was, instead, called upon to assess the reasonableness of FERC's view enunciated in the short-lived Bountiful decision, namely that the preference applied in all relicensings. Its decision that Bountiful was both consistent with the statute and otherwise reasonable does not, as a matter of law or logic, resolve the distinct issue of whether FERC's recent interpretation is also reasonable and in accordance with the statute. [4] It should

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go without saying that an ambiguous or broadly worded statute may admit of more than one interpretation that is reasonable and consistent with Congressional intent. See, e.g., Japan Whaling Association v. American Cetacean Society, --- U.S. ----, 106 S.Ct. 2860 2867, 92 L.Ed.2d 166 (1986) ; Chevron v. NRDC, **467 U. S. Reports 863** -64 , 104 S.Ct. at 2792 ; Chisholm v. FCC, 538 F.2d 349 , 364 (D.C.Cir.), cert. denied, **429 U. S. Reports 890** , 97 S.Ct. 247 , 50 L.Ed.2d 173 (1976) ; see also Office of Communication of the United Church of Christ v. FCC, 590 F.2d 1062 , 1068-69 (D.C.Cir.1978); cf. ICC v. American Trucking Associations, Inc., **467 U. S. Reports 354** , 363-64 n. 7, 104 S.Ct. 2458 , 2463-64 n. 7, 81 L.Ed.2d 282 (1984) ; Immigration & Naturalization Service v. Jong Ha Wang, **450 U. S. Reports 139** , 144-45, 101 S.Ct. 1027 1031, 67 L.Ed.2d 123 (1981) . That is to say, there may be more than one "right" interpretation if Congress has painted with a broad (or at least non-specific) brush so as to permit an agency flexibility in carrying out its duties.

Second. Another ground on which the municipality's preclusion argument founders is that Clark-Cowlitz and FERC were fellow travelers in the Bountiful proceeding. Both advanced the position, now rejected by FERC, that the municipal preference applies in all relicensings. Issue preclusion, however, attaches only to such issues as the parties litigated adversely to each other in the prior litigation. See, e.g., Jack Faucett, 744 F.2d at 125 ; Restatement (Second) of Judgments Sec. 38. Similarly, as to claim preclusion, FERC's successfully defending its position (at that time) in Alabama Power does not bar it from asserting a different position in the current proceedings. See, e.g., I.A.M. National Pension Fund, 723 F.2d at 945 & n. 1. All that is precluded by virtue of FERC's earlier success is another action by the petitioners in Alabama Power, among whom Clark-Cowlitz was of course not to be found (being, indeed, on the opposite side), on the claim of Bountiful 's invalidity. See Nevada v. United States, **463 U. S. Reports 134**

-35 , 103 S.Ct. at 2920 ; Restatement (Second) of Judgment Sec. 19.

In summary, preclusion principles do not foreclose FERC's applying a reinterpretation of section 7(a) in the Merwin proceedings. [5] The Court of Appeals' decision in

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Alabama Power did not address the issue of the propriety of FERC's present interpretation, nor could the claim that this agency interpretation was invalid have been raised before the Eleventh Circuit.

III

Since the interpretation of section 7(a) that FERC first applied in the contest between Pacific Power and Clark-Cowlitz represented a reversal of the position the Commission had espoused in Bountiful, it is appropriate for us to consider whether the application of its change in position was consistent with principles of retroactivity. We are persuaded that it was.

In this circuit, Retail, Wholesale & Department Store Union v. NLRB, 466 F.2d 380 (D.C.Cir.1972) , provides the framework for evaluating retroactive application of rules announced in agency adjudications. See Local 900, International Union of Electrical, Radio & Machine Workers v. NLRB, 727 F.2d 1184 , 1194-95 (D.C.Cir.1984); see also Yakima Valley Cablevision, Inc. v. FCC, 794 F.2d 737 , 746 & n. 35 (D.C.Cir.1986). The general principle is that when as an incident of its adjudicatory function an agency interprets a statute, it may apply that new interpretation in the proceeding before it. See NLRB v. Wyman-Gordon, **394 U. S. Reports 759** , 765-66, 89 S.Ct. 1426 1429, 22 L.Ed.2d 709 (1969) (plurality opinion); see also NLRB v. Bell Aerospace Co., **416 U. S. Reports 267** , 294-95, 94 S.Ct. 1757 , 1771-72, 40 L.Ed.2d 134 (1974) ; Thorpe v. Housing Authority of the City of Durham, **393 U. S. Reports 268** , 282, 89 S.Ct. 518 , 526, 21 L.Ed.2d 474 (1969) ; McDonald v. Watt, 653 F.2d 1035 , 1042 (5th Cir.1981) ("While at one time the determination that a rule was properly established in adjudication would have compelled the conclusion that it should be applied with full retroactive effect, the accepted rule today is that in appropriate cases the court may in the interest of justice make the rule prospective."); 4 K. Davis, Administrative Law Treatise Sec. 20:8, at 30 (2d ed. 1983) ("[A]n agency having rulemaking power is forbidden by ... Wyman-Gordon to make new law in an adjudication if it is to be limited to prospective effect."); Tennessee Gas Pipeline Co. v. FERC, 606 F.2d 1094 , 1114, 1115 (D.C.Cir.1979) (reading Bell Aerospace as affording an agency "broad discretion to announce policy in adjudication ... subject to an exception in a case of severe impact and justifiable reliance on contrary agency pronouncements"), cert. denied, **445 U. S. Reports 920** , 100 S.Ct. 1284 , 63 L.Ed.2d 605 (1980) ; cf. Mullins v. Andrus, 664 F.2d 297 , 302-03 (D.C.Cir.1980) ("[J]udicial decisions normally are to be applied retroactively.") (footnote omitted); National Association of Broadcasters v. FCC, 554 F.2d 1118 , 1130 (D.C.Cir.1976) ("The general rule of long standing is that judicial precedents normally have retroactive as well as prospective effect.").

Nevertheless, a retrospective application can properly be withheld when to apply the new rule to past conduct or prior events would work a "manifest injustice." See Thorpe, **393 U. S. Reports 282** , 89 S.Ct. at 526 . The Retail, Wholesale court set forth a non-exhaustive list of five factors to assist courts in determining whether to grant an exception to the general rule permitting "retroactive" application of a rule enunciated in an agency adjudication:

(1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.

Id. at 390.

The first factor of Retail, Wholesale recognizes that "a number of reasons call[ ]

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for the application of a new rule to the parties to the adjudicatory proceeding in which it is first announced." Id.; see also Local 900, 727 F.2d at 1195 . For one thing, by granting the benefit of a change in the law to those whose efforts may have helped bring about the change, retroactive application of a new principle encourages parties to "advance new theories or ... challenge outworn doctrines." Retail, Wholesale, 466 F.2d at 390 . For another, the Administrative Procedure Act generally contemplates that when an agency proceeds by adjudication, it will apply its ruling to the case at hand; when, on the other hand, it employs rulemaking procedures, its orders ordinarily are to have only prospective effect. See 5 U.S.C. Secs. 551(4)-(7), 553, 554; see also Wyman-Gordon, **394 U. S. Reports 764** , 89 S.Ct. at 1429 . Inasmuch as Merwin was the first proceeding in which FERC announced its reinterpretation, the first Retail, Wholesale factor points in favor of retroactive application. [6]

The second factor requires the court to gauge the unexpectedness of a rule and the extent to which the new principle serves the important but workaday function of filling in the interstices of the law. It implicitly recognizes that the longer and

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more consistently an agency has followed one view of the law, the more likely it is that private parties have reasonably relied to their detriment on that view. See, e.g., Hanover Shoe, Inc. v. United Shoe Machinery Corp., **392 U. S. Reports 481** , 495-502, 88 S.Ct. 2224 , 2232-36, 20 L.Ed.2d 1231 (1968) ; see also NLRB v. Majestic Weaving Co., 355 F.2d 854 , 861 (2d Cir.1966). But here, FERC's prior interpretation of section 7(a) cannot in reason rise to the level of a "well established practice." For one thing, application of the prior interpretation was never a "practice." Bountiful was, after all, FERC's sole pronouncement on an issue that had lain dormant for almost fifty years. Indeed, the entire purpose of the declaratory order proceeding was to provide a forum for resolving this emerging issue. For another thing, the Commission's ruling in that solitary proceeding can scarcely be viewed as "well established." The reader will recall that judicial review of Bountiful had not even concluded when FERC changed its mind as to the meaning of section 7(a). [7]

Now it is true that, by virtue of Bountiful 's existence, FERC was not "required by the very absence of a previous standard" to confront the issue raised in Merwin and to supply a rule. Retail, Wholesale, 466 F.2d at 391 . The second factor thus favors retrospective application less than would be the case in situations where formulation of a rule is necessary to "fill[ ] in the interstices of the [statute]," id. (quoting SEC v. Chenery, **332 U. S. Reports 202** -03 , 67 S.Ct. at 1580). On the other hand, FERC's need to apply its reinterpretation in Merwin was more compelling than those in which an agency shifts its position solely as a result of a change in agency policy. Here, FERC was animated by the conviction that its prior interpretation thwarted Congressional intent; to make bad matters worse, the prospect loomed that an erroneous interpretation would be locked in for a generation, embodied in licenses that would last well into the Twenty-First Century. See Chisholm v. FCC, 538 F.2d at 364 (agency's discretion to change its course is broader when agency believes its prior course is contrary to statutory design); see also Chenery, **332 U. S. Reports 203** , 67 S.Ct. at 1581 ("[R]etroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design ..."). On balance, it seems to us that the second factor weighs against granting an exception to the general rule of retrospective application.

Next, in evaluating possible reliance on Bountiful, we can see little if any period during which Clark-Cowlitz would reasonably have relied on FERC's earlier interpretation. Both the formation of Clark-Cowlitz and its initial efforts toward securing the Merwin license occurred before Bountiful was rendered, at a time when the

applicability of the municipal preference to relicensing proceedings had not been resolved. [8] Obviously, no reliance could have preceded Bountiful. Thereafter, Clark-Cowlitz might optimistically have viewed Bountiful 's interpretation as at least tentatively settled after the Eleventh Circuit's favorable decision. But, upon analysis, a sanguine view as to Bountiful 's permanence would necessarily have been short-lived, for only six months elapsed between the Eleventh Circuit's decision in November 1982 and May 1983, when the Solicitor General revealed FERC's about-face. See FERC's Brief in Support of Petitions for Certiorari at 8-9, J.A. at 106-07. Any reliance on agency fidelity to Bountiful after this development would manifestly have been unreasonable, inasmuch as the agency had concluded (and announced) that its prior reading was wrong as a matter of law. [9]

In sum, viewed most favorably to Clark-Cowlitz, the period during which it could have relied on FERC's prior interpretation spanned no more than six months. Moreover, the presumably sunny prospects for Bountiful 's vitality during this brief period were beclouded in some measure by knowledge of possible Supreme Court review (or, at a minimum, the likelihood of an effort by the incumbent licensee and other private utilities to secure Supreme Court review). We have discovered no legal authority (nor do we see in logic any reason) to support carving out an exception to the rule of retroactivity based on reliance on an agency interpretation so briefly embraced. Cf. Retail, Wholesale, 466 F.2d at 387 & n. 17 (prior interpretation applied in numerous decisions over at least seven years). Although hope springs eternal, hope is no surrogate for reliance.

Clark-Cowlitz's situation fares no better under the fourth Retail, Wholesale factor, to wit, the degree of burden which a retroactive order imposes. As a result of FERC's change in interpretation, Clark-Cowlitz lost the benefit of what is admittedly a highly attractive procedural advantage in competing for a hydroelectric power license. Nevertheless, Clark-Cowlitz obviously retained the unfettered right to compete for the license. It was simply forced to do so on the same terms as non-municipal applicants, entitled to the license only if it proved that its plans were "best adapted to develop, conserve, and utilize in the public interest the water resources of the region." 16 U.S.C. Sec. 800(a). Thus, the situation "is not [one] in which some new liability is sought to be imposed on individuals for past actions which were taken in

good-faith reliance on [agency] pronouncements. Nor are fines or damages involved here." Bell Aerospace, **416 U. S. Reports 295** , 94 S.Ct. at 1772 . Measured against the burdens weighed in other cases, the burden imposed on Clark-Cowlitz is, as we see it, marginal at best. Cf. Local 900, 727 F.2d at 1195 (upholding retroactive application that resulted in imposition of money damages). [10]

The fifth and final factor--the statutory interest in applying a new rule despite the reliance of a party on the old standard--likewise favors retrospective application. Withholding retroactive application would grant Clark-Cowlitz a 30-year benefit to which FERC now believes it is not entitled. The overriding Congressional interest in ensuring that the best qualified contestant (as FERC sees it) operate hydroelectric power projects, in other words, would not be fulfilled at the Merwin site for three decades. [11] This 30-year delay looms large when measured against whatever optimism Clark-Cowlitz may have felt during the six months between judicial affirmance of Bountiful and revelation of FERC's disavowal of that briefly held position.

In addition to application of the Retail, Wholesale analysis, we discern yet another consideration in favor of permitting FERC to apply its reinterpretation. To hold otherwise

would grant Clark-Cowlitz the benefit of a municipal preference that Congress, by enacting the

ECPA, has seen fit to deny to all other municipal applicants. Yet eight of these applicants had applications pending at the time when FERC announced its decision to overrule Bountiful. As a result of FERC's reassessment, eight other applicants suffered disappointment differing from that experienced by Clark-Cowlitz only by what appear to be evanescent shades of graduation. We can see nothing warranting the singling out of Clark-Cowlitz for this boon solely because its application was the first to proceed to the hearing stage. [12]

To the contrary, the more equitable approach would be to treat Clark-Cowlitz like the other similarly situated municipal applicants, which, no one disputes, can no longer claim the benefit of the municipal preference in the wake of the ECPA. See, e.g., Bradley v. School Board of the City of Richmond, **416 U. S. Reports 696** , 714-16, 94 S.Ct. 2006 , 2017-18, 40 L.Ed.2d 476 (1974) . And it should not go unnoticed that equal treatment is exactly what Clark-Cowlitz has been asking for all along, contending, for example, that it "and every other party [to Bountiful] reasonably relied on the assertion of FERC" in Bountiful. Petitioners' Brief at 31.

IV

This brings us at last to the substantive heart of the petition for review: the propriety in law of FERC's determination that no municipal preference applies in relicensing proceedings in which the incumbent licensee is seeking to remain on the project. Confronted with an agency's interpretation of the statute that Congress has charged it with administering, we must first employ the traditional tools of statutory construction to determine whether Congress has spoken directly to the precise question at issue. If Congress has not addressed the precise question, or if it has addressed the issue but done so ambiguously, the question becomes whether the agency's interpretation is a reasonable (or permissible) one. See, e.g., Cardoza-Fonseca, 107 S.Ct. at 1220-22 ; Chevron v. NRDC, **467 U. S. Reports 844** , 104 S.Ct. at 2872 ; Rettig v. Pension Benefit Guaranty Corp., 744 F.2d 133 , 141 (D.C.Cir.1984). Upon analysis of the statute, we are persuaded that Congress has not in this instance clearly and specifically addressed the role of the municipal preference in relicensings and that FERC's interpretation of section 7(a) should be upheld as reasonable.

The focus of this dispute is the language of two provisions of the Federal Power Act. Section 7(a) of the Act, 16 U.S.C. Sec. 800(a), which is set forth supra note 1, creates a preference for municipal applicants. It specifies three situations in which the preference applies: when the Commission is (1) "issuing preliminary permits" under section 5 of the Act, id. Sec. 798; see also id. Sec. 797(f); (2) "[issuing] licenses where no preliminary permit has been issued"; and (3) "issuing licenses to new licensees under section 808 of this title."

The third category of section 7(a) is the only one arguably applicable here because the proceedings before the Commission were relicensing proceedings carried out under section 15 of the Act, 16 U.S.C. Sec. 808, the provision to which section 7(a) makes express reference. Indeed, Clark-Cowlitz concedes that neither the first nor the second situation obtains here. Petitioner's Brief at 34. That, then, brings us to section 808 (section 15 of the Federal Power Act), which concerns relicensing proceedings. It provides in pertinent part as follows:

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(a) If the United States does not, at the expiration of the original license, exercise its right to take over, maintain, and operate any project or projects of the licensee, as provided in section 807 of this title, the commission is authorized to issue a new license to the original licensee upon such terms and conditions as may be authorized or required under the then existing laws and regulations, or to issue a new license under said terms and conditions to a new licensee, which license may cover any project or projects covered by the original license, and shall be issued on the condition that the new licensee shall, before taking possession of such project or projects, pay such amount, and assume such contracts as the United States is required to do in the manner specified in section 807 of this title: Provided, That in the event the United States does not exercise the right to take over or does not issue a license to a new licensee, or issue a new

license to the original licensee, upon reasonable terms, then the commission shall issue from year to year an annual license to the then licensee under the terms and conditions of the original license until the property is taken over or a new license is issued as aforesaid.

Id.

FERC determined that the third (and final) situation described in the municipal preference clause of section 7(a) did not govern the proceedings before it. Merwin, 25 F.E.R.C. p 61,052. It reasoned that Pacific Power was an "original licensee," not a "new licensee," within the meaning of section 15. Under this analysis, the Commission was not "issuing [a] license[ ] to a new licensee," under section 7(a). Id. Sec. 800(a). Rather, it was issuing "a new licensee to the original licensee."

The Commission thus relied on the statutory distinction in section 15 between an "original licensee" and a "new licensee." Id. Sec. 808(a) (emphasis added). The Commission further found that this interpretation, mandated by the terms of sections 7 and 15, was inconsistent with neither the structure of the Act nor its legislative history. By virtue of this analysis, the Commission concluded that its contrary view in Bountiful was "legally erroneous." Having interpreted the municipal preference clause not to apply in relicensings involving "original licensees," the Commission considered the relevant standards to be contained in the second clause of section 7(a), which applies "as between other applicants." Id. Sec. 800(a). Thus, in FERC's view, any relicensing in which one of the applicants was an incumbent (or more precisely, "original") licensee was a proceeding "between other applicants."

In our view, the Commission's new interpretation (withholding the municipal preference in relicensing proceedings in which the original licensee is involved) represents a reasonable reading of the statute. Indeed, to embrace the contrary interpretation the reader must modify either the statute or the facts in one of two ways; (1) by characterizing Pacific Power, the incumbent, as a "new licensee" when it is in fact the "original licensee"; or (2) by rewording the provision to mandate application of the municipal preference when "entertaining applications for a license to a new license." 16 U.S.C. Sec. 800(a).

Both approaches do violence to the terms of the statute. The first ignores the distinction in section 808(a) between "original licensees" and "new licensees." Indeed, the first approach renders surplusage the concept of "original licensee," an act of judicial surgery which should be avoided when means are at hand to save the entire statute. See, e.g., Reiter v. Sonotone Corp., **442 U. S. Reports 330** , 339, 99 S.Ct. 2326 2331, 60 L.Ed.2d 931 (1979) ; National Insulation Transportation Committee v. ICC, 683 F.2d 533 , 537 (D.C.Cir.1982); In re Surface Mining Regulation Litigation, 627 F.2d 1346 , 1362 (D.C.Cir.1980). The second approach ignores the fact that the provisions distinguish between "issuing" a license and "entertain[ing] applications for" a license. Compare id. Sec. 808(a) with id. Sec. 807(b). [13] Congress would, it seems to

us, likely have employed the latter term in Sec. 800(a) had it intended to refer to the process of receiving applications for the issuance of a license to a new licensee. [14] Thus, compared to the competing interpretation championed by Clark-Cowlitz, FERC's reading has the substantial virtue of giving meaning to all of the words of the statute and depending only on the words that Congress employed in drafting it. See, e.g., United States v. Menasche, **348 U. S. Reports 528** , 538-39, 75 S.Ct. 513 , 519-20, 99 L.Ed. 615 (1955) ; Market Co. v. Hoffman, 101 U.S. (11 Otto) 112, 115-16, 25 L.Ed. 782 (1879) . In addition, FERC's approach construes the phrase "issu[ing] a license to a new licensee" in section 7 of the Act to have the same meaning as that phrase does in section 15, the provision expressly incorporated in section 7. Cf. Stafford v. Briggs, **444 U. S. Reports 527** , 535-36, 100 S.Ct. 774 , 780, 63 L.Ed.2d 1 (1980) ; Atlantic Cleaners & Dyers, Inc. v. United States, **286 U. S. Reports 427** , 433, 52 S.Ct. 607 , 609, 76 L.Ed. 1204 (1932) .

On the other hand, the merit of FERC's present interpretation is not entirely free from doubt.

Specifically, it is in tension with the opening phrase of the second clause of section 7(a), "as between other applicants." [15] Clark-Cowlitz's argument--that the municipal preference (in the first clause of section 7(a)) applies in any contest between a State or municipality and a private entity, and that the second clause applies "between other applicants," i.e., in relicensing proceedings between any two private entities, including original licensees--is not without force. This interpretation arguably gives a more natural reading to the phrase "between other applicants";

on the other hand, it suffers from the shortcomings adumbrated above.

Fortunately, we are not without guidance in this unhappy (but hardly unfamiliar) situation of plausible competing interpretations of statutes. The Supreme Court only recently reminded us that a court cannot substitute what it considers the "more natural" construction of an ambiguous statute for a reasonable interpretation advanced by an agency. See Young v. Community Nutrition Institute, 477 U.S. 974 , 106 S.Ct. 2360 , 2364-65, 90 L.Ed.2d 959 (1986) ; see also Cardoza-Fonseca, 107 S.Ct. at 1220 n. 29; Chevron v. NRDC, **467 U. S. Reports 842** -44 , 104 S.Ct. at 2781-82 . Since it is beyond cavil that section 7(a) is reasonably susceptible to the interpretation proffered by FERC, we are duty bound to uphold it.

Nothing in the legislative history warrants upsetting this construction of the statute. As a general matter, the legislative history in this respect is not especially illuminating; indeed, the "legislative history here as usual is more vague than the statute we are called upon to interpret." United States v. Public Utilities Commission, **345 U. S. Reports 295** , 320, 73 S.Ct. 706 , 720, 97 L.Ed. 1020 (1953) (Jackson, J., concurring); see also Burlington Northern Railroad Co. v. Oklahoma Tax Commission, --- U.S. ----, 107 S.Ct. 1855 , 1859-60, 95 L.Ed.2d 404 (1987) . It certainly points in no specific direction. On the one hand, the history favoring Clark-Cowlitz's position is, to quote the Eleventh Circuit's charitable characterization, "weak." Alabama Power Co., 685 F.2d at 1317 . On the other hand, some portions of the history provide modest, albeit scarcely overpowering, support for FERC's present position. [16] But what does appear beyond question is that resort to the legislative history yields no "compelling indications" of the sort necessary to overturn an agency's reading that is in harmony with the express language of the legislation. See, e.g., Burlington Northern, 107 S.Ct. at 1860 ; Chemical Manufacturers Association v. Natural Resources Defense Council, Inc., **470 U. S. Reports 116** , 126, 105 S.Ct. 1102 1108, 84 L.Ed.2d 90 (1985) ; CBS, **453 U. S. Reports 382** , 101 S.Ct. at 2823 ; Ford Motor Credit Co. v. Milhollin, **444 U. S. Reports 555** , 565-68, 100 S.Ct. 790 , 796-98, 63 L.Ed.2d 22 (1980) ; see also, e.g., Consumer Product Safety Commission v. GTE Sylvania, Inc., **447 U. S. Reports 102** , 108, 100 S.Ct. 2051 2056, 64 L.Ed.2d 766 (1980) . But cf. Board of Governors v. Dimension Financial Corp., **474 U. S. Reports 361** , 106 S.Ct. 681 , 88 L.Ed.2d 691 (1986) .

Finally, FERC's interpretation accords with the broader purposes animating Congress, to the extent those purposes can fairly be discerned from the structure and terms of the statute itself. The statutory mechanism provides for long-term licenses, at the end of which the United States or a subsequent licensee may, in effect, "buy out" the original licensee. This approach recognizes the need on the part of private capital for stability and a return on investment, see, e.g., FPC v. Hope Natural Gas Co., **320 U. S. Reports 591** , 603, 605, 64 S.Ct. 281 , 288, 289, 88 L.Ed. 333 (1944) ; Jersey Central Power & Light Co. v. FERC, 810 F.2d 1168 , 1176 (D.C.Cir.1987), and, at the same time, the need to safeguard the public interest, which is, of course, the agency's raison d'etre. FERC's view of the limited circumstances in which the municipal preference is available is, we believe, consistent with this balancing of competing interests. Municipalities are entitled to a preference in relicensing over all other applicants when the incumbent licensee does not seek a new license. When, on the other hand, the original licensee seeks a renewed license, the municipality must show that it is better adapted than the incumbent if it is to unseat the original licensee. While the Act confers no "renewal expectancy," as is the case in the FCC's stewardship over broadcast licenses, neither does it, as the Commission reads the statute, obliterate 50 years of investment, improvement and administration of a project by conferring a special preference based entirely on the identity of the entity seeking to unseat the incumbent.

Far from being an "absurd

result," FERC's view of the statute appears reasonably to accommodate the public and private interests taken into account by the Act.

V

Having determined that the Commission could properly jettison Bountiful and apply its new interpretation of section 7(a) in the contest between Clark-Cowlitz and Pacific Power, we confront two final, related issues: first, whether FERC could properly take into account the relative economic impacts of an award to one or the other contestant; and second, if so, whether the Commission's assessment of these impacts avoids the APA's proscription of "arbitrary" and "capricious" agency action. 5 U.S.C. Sec. 706(2)(A). We are satisfied that FERC may include in its deliberations consideration of the economic consequences of the grant of a license. We are unable to conclude, however, that FERC's consideration of those consequences in the Merwin proceedings passes muster as reasoned decision making.

A

Under the standards governing review of agency interpretations of statutes, see supra text at 26, we have no difficulty in upholding FERC's interpretation as a permissible construction. As we have already discussed, FERC properly could, consistent with Chevron principles, consider the Merwin proceedings as arising under the latter half of section 7(a). That portion of the statute provides:

[A]s between other applicants, the Commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plans.

Although it is certainly arguable that the economic impacts of an award are not factors properly subsumed within consideration of competing applicants' plans, two aspects of the language support FERC's position that it was nonetheless permissible to consider these impacts. First, in contrast to the initial part of 7(a), the second half contains the permissive verb "may." To be sure, "may" can sometimes express the language of command. See, e.g., Commonwealth v. Lynn, 501 F.2d 848 , 854 & n. 21 (D.C.Cir.1974); cf. Association of American Railroads v. Costle, 562 F.2d 1310 , 1312 (D.C.Cir.1977). Nevertheless, the fact that Congress saw fit to employ "shall" in the first clause of section 7(a) powerfully suggests that the distinction has meaning--that its use of "may" in the second clause was intended to vest in FERC, in proceedings "between other applicants," the discretion to consider factors extrinsic to the applicants' plans. Cf. United States v. Hohri, --- U.S. ----, ----, 107 S.Ct. 2246 2250, 96 L.Ed.2d 51 (1987) . In addition, the second clause of section 7(a) does not, like the first, contain a provision permitting applicants under certain circumstances to modify their plans to be "equally well adapted" as those of competing applicants. The presence of this provision in the municipal preference clause tends to suggest that relicensing decisions under that clause should be based exclusively on the plans themselves. The absence of this provision in the second clause buttresses the Commission's view that in proceedings like the one at hand, section 7(a) does not force FERC to close its eyes to factors extrinsic to the plans of the license applicants.

Further support for the Commission's interpretation is found in section 10(a) of the Federal Power Act, which prescribes a broad public interest inquiry to guide the Commission in crafting conditions for licenses. [17] As FERC persuasively argues,

the breadth of the public-interest inquiry permitted under section 10(a) should inform the

interpretation of section 7(a)'s directions as to who should hold the license.

Finally, deferring to the Commission's expertise in technical, economic considerations is consistent with venerable case law interpreting sections 7 and 10 of the Act. See, e.g., National Hells Canyon Association v. FPC, 237 F.2d 777 , 779-80 (D.C.Cir.1956), cert. denied, **353 U. S. Reports 924** , 77 S.Ct. 681 , 1 L.Ed.2d 720 (1957) (noting that recurrence in sections 7(b) and 10(a) of the phrase "in the judgment of the Commission" emphasizes Commission's broad discretion); see also United States ex rel. Chapman v. FPC, **345 U. S. Reports 153** , 171, 73 S.Ct. 609 , 619, 97 L.Ed. 918 (1953) (judgments about technical and economic issues committed to Commission's discretion).

In sum, we believe the Commission reasonably interpreted the statutes governing licensing of hydroelectric projects to permit considerations of the economic consequences of its award. We turn, then, to the Commission's application of this interpretation.

B

In addition to attacking FERC's authority to take economic impacts into account, petitioner faults the Commission's assessment of these impacts. We are constrained to agree.

The Commission focused solely on the consequences of its decision on the customers of Pacific Power and Clark-Cowlitz. See Merwin, 25 F.E.R.C. at 61,196-201. Assessing the long-term impacts of the decision confronting it, FERC found that if it awarded the license to Clark-Cowlitz, Pacific Power would ultimately be forced to replace the lost Merwin power with much more expensive power, either from thermal generating facilities that Pacific Power would have to construct or from power supplied by the Bonneville Power Administration at its so-called "New Resources" rate. Id. at 61,197-98. In contrast, Clark-Cowlitz could, if it failed to obtain the Merwin license, service its customers with additional purchases from Bonneville at the latter's preferential "Priority Firm" rate. Thus, although precise calculation was impossible, it was clear that Pacific Power's alternative costs would greatly exceed those of Clark-Cowlitz. Moreover, in the short term, the decrease in Clark-Cowlitz's cost of power in the event of an award to it paled in comparison to the increased cost of power Pacific Power would incur in that event. Id. at 61,198. In general, the Commission found, these impacts would be passed along to customers of the two entities. Balancing the heavy cost increase that a significant portion of Pacific Power's customers would absorb as against the more modest benefits Clark-Cowlitz's would receive should the latter obtain the license, FERC determined to place the license in Pacific Power's hands. Id. at 61,201.

The Commission's analysis, upon reflection, overlooks important aspects of the problem before it. See Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co., **463 U. S. Reports 29** , 43, 103 S.Ct. 2856 2867, 77 L.Ed.2d 443 (1983) . To be sure, the Commission rightly perceived that measurable dislocation would flow from unseating Pacific Power from the Merwin project. We also recognize the commonsense force of FERC's taking into account Clark-Cowlitz's access as a municipal entity to federally subsidized Bonneville power. Nevertheless, the Commission's truncated analysis raises as many questions as it answers.

For one thing, the Commission's analysis would appear invariably to favor the status quo and (other things being equal) all but guarantee an award to the incumbent licensee where a competing State or municipal applicant has preferential access to subsidized power. This seems to transmogrify the second clause of section 7(a)--which, as we have seen, contemplates an award to the best-suited applicant, regardless of

identity--into a virtual per se (or at least strong) preference favoring the incumbent.

For another, the Commission's exclusive focus on the customers of the two contestants blinds it to economic ramifications meriting its consideration. Specifically, the Commission appears to have ignored the fact that an award to Clark-Cowlitz would (presumably) free up low rate ("Priority Firm") Bonneville power for other customers in the Pacific Northwest. Thus, countervailing the detriment to Pacific Power's customers was not only the benefit to Clark-Cowlitz's customers, but also the benefits presumably accruing to other power customers in the region. The third element of the equation, however, is entirely missing from the balance struck in the Commission's decision.

Finally, FERC's dispositive emphasis on the dislocation attendant to unseating an incumbent licensee appears not to take into account the fact that the energy needs of the region and available sources of power within the region remain constant regardless of which applicant ultimately secures Merwin license. It would seem, in other words, that shifting the control of a single power source in the region does not alter the energy landscape of the region. Subsidized Bonneville power will still exist even if Clark-Cowlitz uses less of that power and replaces it with power from the Merwin project. The benefits (in the form of lower rates) from Bonneville power will presumably remain and find their way to consumers in the region, albeit to different groups of consumers (depending obviously on which applicant receives the Merwin license).

Our observations in this respect should not, however, be misconstrued or overread. We emphatically do not require FERC to embrace any particular economic theory from the range of rational approaches. What we do require is that the Commission come to grips with the obvious ramifications of its approach and address them in a reasoned fashion.

VI

To summarize our holding, we conclude that neither preclusion nor retroactivity principles prevented FERC from abandoning in the Merwin relicensing proceedings the interpretation of section 7(a) it adopted in Bountiful. Furthermore, this later interpretation is consistent with Congressional intent embodied in the Federal Power Act and is otherwise reasonable. We conclude, however, that the Commission's analysis of the relative economic impacts of its award of the Merwin license is insufficient to pass muster under the APA. We therefore remand this case to the Commission for further elucidation of its determination that Pacific Power's higher alternative costs justified awarding the license to it. Its order in all other respects is hereby affirmed. See 16 U.S.C. Sec. 825l (b).

Judgment Accordingly.

MIKVA, Circuit Judge, with whom Circuit Judges ROBINSON and EDWARDS join, dissenting :

In the seven years since the Federal Energy Regulatory Commission (FERC) determined, with apparent finality, that the municipal preference embodied in the Federal Power Act, 15 U.S.C. Sec. 791a et seq. (1982), applies to relicensing proceedings, this case has been beset by an unusual and extended series of twists and turns, confounding the parties as well as this court. In permitting FERC to overrule its prior holding and apply its new interpretation retroactively to petitioner Clark-Cowlitz Joint Operating Agency (Clark-Cowlitz), this court today adds its own contribution to the tortuous unfolding of this case. The majority's conclusions are marred at every step by skewed articulation of the facts and warped application of the law. The court today manages in one opinion to do violence to principles of preclusion, retroactivity, and statutory interpretation. I dissent.

I.

A. Retroactivity Doctrine and Administrative Adjudications

The largest part of the court's opinion is devoted to its finding that FERC's application

of its reversal of field to the parties in Pacific Power & Light Co., 25 F.E.R.C. (CCH) p 61,052, reh'g denied, 25 F.E.R.C. (CCH) p 61,290 (1983) ("Merwin"), was consistent with principles of retroactivity. The court begins its analysis by citing a "general principle" that retroactive application of a new interpretation announced in an agency adjudication is favored, and prospective application is permissible only if necessary to avoid a "manifest injustice." Majority opinion (Maj. op.) at 1081. There is no such general principle under the law. Courts reviewing an agency's attempt to retroactively apply a new policy announced in an administrative adjudication must make an independent determination whether "the inequity of retroactive application [is] counterbalanced by sufficiently significant statutory interests." Retail, Wholesale & Dep't Store Union v. NLRB, 466 F.2d 380 , 390 (D.C.Cir.1972). This determination incorporates neither a presumption of retroactive application nor a presumption of prospective application. Rather, as the Supreme Court has made clear, it involves a straight-word balancing test in which the ill effect of retroactive application is weighed against the damage to the statutory design caused by prospective application. See SEC v. Chenery, **332 U. S. Reports 194** , 203, 67 S.Ct. 1575 1580, 91 L.Ed. 1995 (1947) . It is highly inappropriate for this court to transform this test by adjusting the scales in favor of retroactive application. Moreover, the "manifest injustice" test to which the court refers comes from Thorpe v. Housing Authority of the City of Durham, **393 U. S. Reports 268** , 89 S.Ct. 518 , 21 L.Ed.2d 474 (1969) , a case that is completely inapposite. In Thorpe, the Court found that it would not be manifestly unjust for the agency to apply a new standard that already had been established at the time of the proceeding. The equities are far sharper, and the legal test quite different, when an agency seeks to apply a new standard to the parties to the very adjudication in which the reversal is announced.

As the majority recognizes, the seminal case fixing the law of the circuit for retroactive application of agency adjudications is Retail, Wholesale & Dep't Store Union v. NLRB, 466 F.2d 380 (D.C.Cir.1972) . In Retail, Wholesale, this court refused to give retroactive effect to a new rule adopted in the course of a National Labor Relations Board adjudication. The court listed five factors which courts must put into the balance in determining whether a decision should have retroactive effect:

(1)whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.

Retail, Wholesale, 466 F.2d at 390 . These considerations provide in the context of agency adjudication a way to attend to the principal concerns of retroactivity analysis--"lack of notice and the degree of reliance on former standards." Id. at 390 n. 22. The Retail, Wholesale test attempts to reconcile the interests of the litigants with the overall public interest in effectuation of a statutory scheme: retroactive application is appropriate only if the court is satisfied that the prejudice to parties who justifiably relied on the previous standard is outweighed by the need to advance the statutory purpose which the new rule will serve. See McDonald v. Watt, 653 F.2d 1035 , 1045 (5th Cir.1981); Sierra Club v. EPA, 719 F.2d 436 , 468 (D.C.Cir.1983).

The Retail, Wholesale test is specifically adapted to the unique circumstances of agency attempts to retroactively apply a new policy announced in an administrative adjudication. Although the principles of retroactive application of judicial decisions serve as a general guide in the context of administrative adjudications, 4 K. Davis, Treatise on Administrative Law Sec. 20.7, at 23 (2d ed. 1983); see Daughters of Miriam Center for the Aged v. Matthews, 590 F.2d 1250 , 1259 (3rd Cir.1978), analysis of administrative decisions is colored by agencies'

ability to announce new policy via either adjudication or rulemaking. On the one hand, the

agency needs and enjoys considerable discretion in choosing which vehicle is the more appropriate for formulating new standards in a given case. See SEC v. Chenery Corp., **332 U. S. Reports 194** , 202-03, 67 S.Ct. at 1580 (1947) . On the other hand, this flexibility means that an agency is less justified in relying upon adjudication to impose new standards of conduct retroactively, because the agency, unlike courts, has the option to promulgate a rule prospectively and thereby avoid imposing burdens on parties who have relied on the prior standard. See NLRB v. Majestic Weaving Co., 355 F.2d 854 , 860 (2d Cir.1966) (Friendly, J.); Bonfield, The Federal APA and State Administrative Law, 72 Va.L.R. 297, 330 (1986).

Several additional principles emerge from cases in which this court has reviewed agency decisions applying a new standard retroactively. First, whether a new standard should be applied is a question of law. Agencies possess no particular expertise on the issue of retroactivity, and reviewing courts in turn have "no overriding obligation of deference" to an agency's decision to give retroactive effect to a new rule. Retail, Wholesale, 466 F.2d at 390 . Second, agency decisions to apply an order retroactively must be the product of rational analysis, and "the law requires that an agency explain ... how it determined that the balancing of the harms and benefits favors giving a change in policy retroactive application." Yakima Valley Cablevision, Inc. v. FCC, 794 F.2d 737 , 746 (D.C.Cir.1986). Third, an agency's failure to consider the less drastic alternative of prospective application may be considered arbitrary and capricious and thus constitute grounds for reversal. Id.

B. Application

Applying the Retail, Wholesale test to the facts of this case compels the conclusion that FERC should not have applied its reversal of policy to Clark-Cowlitz. The first Retail, Wholesale factor--whether the particular rule is one of first impression--is anchored in a recognition that "the problem of retroactive application has a somewhat different aspect in cases not of first but of second impression, where an agency alters an established rule defining permissible conduct which has been generally recognized and relied on throughout the industry that it regulates." NLRB v. Majestic Weaving Co., 355 F.2d 854 , 860 (2d Cir.1966); see Retail, Wholesale, 466 F.2d at 390 . Thus, when an agency already has considered the issue and established a firm rule, a court is more likely to require prospective application of the agency's reinterpretation. We have here a classic example of a case of second impression. As the majority observes, see Maj. op. at 1076, three years before the orders under review, the Commission convened a special declaratory proceeding for the explicit purpose of resolving the municipal preference issue. It then adopted a clearcut interpretation of section 7(a), and ordered the parties to proceed on the basis of that interpretation. This factor thus weighs squarely on the side of prospective application.

The majority concludes that "inasmuch as Merwin was the first proceeding in which FERC announced its reinterpretation, the first Retail, Wholesale factor points in favor of retroactive application." Maj. op. at 1082. This conclusion is, simply put, baffling. The majority flatly misinterprets the use of the term "first impression" in Retail, Wholesale. Of course Merwin was the first proceeding in which FERC announced its reversal; retroactivity analysis assumes that the decision at issue changed the law. See Retail, Wholesale, 466 F.2d at 389 (retroactivity analysis permits courts to determine whether to grant or deny retroactive force to newly established rules). Thus, the first factor does not look to whether the very decision at issue had ever been articulated before; such an inquiry would make the first factor meaningless. Rather, the court was inquiring whether the agency had previously decided the underlying issue and was now seeking to depart from its previous resolution. Moreover, the court cited the very language from the Supreme Court's opinion in Chenery which the majority concedes

contains "the more typical understanding of the term [first impression] as referring to situations in which an agency confronts an issue that it has not resolved before." Maj. op. at 1082 n. 6. Finally, the court in Retail, Wholesale noted that it was reviewing "not a case of first, but of second

impression." Retail, Wholesale, 466 F.2d at 390 (emphasis added). The majority thus has indulged in a tendentious and utterly fanciful rewriting of this part of the Retail, Wholesale opinion.

The second Retail, Wholesale factor requires the court to determine "whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law." Retail, Wholesale, 466 F.2d at 390 . If the new rule falls into the former category rather than the latter, it impinges on the "principal concern of [retroactivity analysis]--lack of notice and the degree of reliance on former standards." Id. n. 22. The Commission's about-face in Merwin falls more naturally into the first category rather than the second. Unlike the agency in Chenery, in which retroactive application was allowed, FERC was not "filling in the interstices of the Act." **332 U. S. Reports 202** , 67 S.Ct. at 1580 . Rather, as in Retail, Wholesale, in which retroactive application was refused, it was announcing a 180-degree turnaround from a prior clear standard. See Retail, Wholesale, 466 F.2d at 391 . The Commission previously had given careful consideration to the issue--conducting an unprecedented full day of oral argument--and then determined unanimously that the municipal preference applies to relicensing proceedings. The majority points out that only three years elapsed in this case between the agency's initial determination and its subsequent reversal, whereas the interval in Retail, Wholesale was seven years. Besides the fact that the difference in intervals is hardly dramatic, the majority's position falsely equates "well established" with "longstanding." The firmness of a precedent may, but need not, be connected to its longstandingness. Indeed, the majority's assumption that more recent precedent is somehow "soft" is inimical to the rule of law. In this case, the question had been conclusively settled when the Commission announced a sudden and complete reversal of field. Thus, the second factor also cuts in favor of prospective application.

The third Retail, Wholesale factor is the extent of Clark-Cowlitz's reliance on the Commission's decision in City of Bountiful, Utah, 11 F.E.R.C. (CCH) p 61,337 (June 27, 1980), reh'g denied, 12 F.E.R.C. (CCH) p 61,179 (Aug. 21, 1980) ("Bountiful "). This third factor also counsels in favor of prospective application. The majority concludes that Clark-Cowlitz could only have reasonably relied on the prior interpretation until May of 1983, when the Solicitor General revealed FERC's dissatisfaction with the result in Bountiful. Such a degree of reliance admittedly would be modest, although not impalpable. However, Clark-Cowlitz's reliance reasonably extended considerably beyond May of 1983. To see why this is so, it is necessary to fill in somewhat the majority's statement of facts, which omits a few critical details that demonstrate that Clark-Cowlitz's reasonable reliance on the Bountiful decision was significant.

In its unanimous decision in Bountiful, the Commission included an order that all pending relicensing applications "go forward in light of this declaratory order." 11 F.E.R.C. (CCH) p 61,337 at 61,736. In accord with the Commission's directive, Clark-Cowlitz filed in October of 1980 the first of two motions requesting a hearing on the Merwin license. The Commission also specifically declined to postpone the hearing pending judicial review of Bountiful. See J.A. 289. Thus, although the majority discounts them, Clark-Cowlitz's preliminary efforts after the successful resolution of Bountiful were certainly in reasonable reliance on (indeed, mandated by) the Bountiful decision, and in fact they enabled Clark-Cowlitz to become the first (and, given subsequent events, the only) municipal applicant to proceed to a hearing in a competitive relicensing proceeding.

Three days after the decision of the Eleventh Circuit (before whom the Commission strenuously and successfully defended its

position in Bountiful), the Merwin hearing convened. Both parties agreed that the municipal preference applied to the Merwin proceeding and focused only on the remaining statutory issue under 7(a)--whether the two entities were "equally well adapted to conserve and utilize the water resources of the region." Joint Statement of Major Contested Issues, reprinted in J.A., at 298-300. Clark-Cowlitz's efforts at this hearing therefore also were taken in reliance on Bountiful. The

Administrative Law Judge concluded that the two applicants were equally well adapted to conserve and utilize the region's water resources. He therefore applied the municipal preference and entered an order awarding the license to Clark-Cowlitz. Pacific Power immediately appealed to the Commission on the ground that it was the superior candidate and therefore deserved the license notwithstanding the municipal preference.

To this point the Merwin controversy had been an unremarkable outgrowth of the Commission's original decision in Bountiful; with Clark-Cowlitz having gone a fair way towards securing the license, however, the case began to take on unusual convolutions. The Commission had undergone a substantial change in personnel following the 1980 election. Three days before the ALJ's decision in Merwin, the reconstituted Commission met in secret session. See Clark-Cowlitz Joint Operating Agency v. FERC, 798 F.2d 499 (D.C.Cir.1986) . As the Commission later revealed, at that closed meeting a majority of the Commissioners registered disagreement with their predecessors' decision in Bountiful. They voted to ask the Solicitor General to recommend that the Supreme Court grant the private utilities' pending petitions for certiorari and remand the case to the Commission. See Brief for the Federal Energy Regulatory Commission on Petitions for a Writ of Certiorari at 8, Utah Power & Light Co. v. FERC, **463 U. S. Reports 1230** , 103 S.Ct. 3573 , 77 L.Ed.2d 1415 (1983) , reprinted in J.A. 106, at 107. A principal reason for this request was the Commission's conviction that if certiorari were denied, the Bountiful decision would be binding as to applicants who participated in Bountiful under principles of res judicata. See id., J.A. at 106-07. The Solicitor did not comply precisely with the Commission's request. Instead, he urged the Supreme Court to remand the case to the Eleventh Circuit for reconsideration in light of "intervening circumstances"--to wit, the fact that "a majority of the Commissioners, four of whom were appointed after the issuance of [Bountiful], expressed their disagreement with the Commission's earlier position in these orders." Id., J.A. at 106. The Supreme Court, however, denied certiorari. See Utah Power & Light Co. v. FERC, **463 U. S. Reports 1230** , 103 S.Ct. 3573 , 77 L.Ed.2d 1415 (1983) .

The denial of certiorari might have appeared to quiet any potential argument against granting Clark-Cowlitz a license to operate the Merwin Project. A majority of the Commission, however, decided to continue to pursue its opposition to the municipal preference. In its review of the ALJ's decision in Merwin, the Commission, in a 3-2 decision, simply overruled Bountiful. 25 F.E.R.C. (CCH) p 61,052 (Oct. 7, 1983). Although the majority obscures this vital fact, the Commission's volte-face was completely unforeshadowed: the Bountiful interpretation had never been challenged during the course of the Merwin litigation, the parties had not briefed it, and the Commission had given no indication that the issue might even be open for reconsideration.

The above scenario differs materially from that obtaining in other proceedings in which a rule is changed. Normally parties will be on notice that the previous interpretation is subject to revision in that proceeding; any reliance on the old standard in the party's litigation efforts therefore would be unreasonable. Here, however, the parties had no notice that FERC considered Bountiful to be open for reconsideration in Merwin and thus reasonably proceeded on the assumption that the municipal preference applied. Moreover, the Commission's request for certiorari only made it more reasonable to rely on Bountiful, because the Commission had indicated that the municipal

preference certainly would apply to pending relicensing proceedings if the Court denied the application, as it did. Thus, under the unusual facts of this case, Clark-Cowlitz's efforts during the course of the Merwin proceeding must also be counted as part of its reasonable reliance on the Commission's decision in Bountiful.

In the three years between the Commission's proclamations in Bountiful and Merwin, Clark-Cowlitz relied on the established standard to a degree unique among the many municipal suitors for expiring licenses. Clark-Cowlitz was the only municipal applicant to proceed to hearing in a competitive relicensing proceeding. The municipality's efforts to get the Commission to schedule

a hearing, as well as the two-year course of the Merwin proceeding, entailed a substantial outlay of time and money. Clark-Cowlitz participated in voluminous discovery, engaged experts in several fields, prepared memoranda and four briefs (none of which addressed the supposedly settled municipal preference issue), and presented its case in prehearing conferences and the actual hearing before the ALJ. This reliance was significant, especially for a municipal applicant of limited resources. The third Retail, Wholesale factor therefore cuts distinctly in favor of prospective application.

The degree of burden which the retroactive order imposes on Clark-Cowlitz, the fourth Retail, Wholesale factor, also counsels in favor of prospective application. Clark-Cowlitz is a municipal corporation formed for the express purpose of seeking the Merwin license. Deprivation of that license--the effect of applying the Commission's order retroactively--is therefore quite a severe hardship for the municipality. It thwarts the single purpose which is quite literally Clark-Cowlitz's raison d'etre.

The first four factors, which gauge the litigants' personal interest in not being judged under a newly announced standard, thus present a fairly compelling case for prospective application. Although there is room for reasonable disagreement as to the force of some of these factors in the instant case, the important point, which the majority fails to recognize, is that whatever the impact of the first four factors, retroactive application is appropriate only if the court finds that the first four factors are counterbalanced by the fifth factor--the statutory interest in applying a new rule. "Unless the burden of imposing the new standard is de minimis, or the newly discovered statutory design compels its retroactive application, the principles which underlie the very notion of an ordered society, in which authoritatively established rules of conduct may fairly be relied upon, must preclude its retroactive effect." Retail, Wholesale, 366 F.2d at 392 . See id. at 390 ("courts have not infrequently declined to enforce administrative orders when in their view the inequity of retroactive application has not been counterbalanced by sufficiently significant statutory interests."); see also Sierra Club v. EPA, 719 F.2d 436 , 468 (D.C.Cir.1983), cert. denied, **468 U. S. Reports 1204** , 104 S.Ct. 3571 , 82 L.Ed.2d 870 (1984) ("The statutory interest in applying the new rule despite individual reliance is, of course, the crucial consideration in the context of requiring an agency to apply one of its rules retroactively."). In this case, the majority makes no such finding, nor could it, because there is no statutory interest in retroactive application.

Normally, of course, assuming a new interpretation is not unfaithful to the statutory scheme, there will be some statutory interest in retroactive application, and the court must weigh that interest against the ill effects of retroactivity. See Chenery, **332 U. S. Reports 194** , 203, 67 S.Ct. 1575 1580, 95 L.Ed. 1995 (1947) . In this respect, however, as in so many others, this case is a true rara avis. The current statutory scheme specifically disavows any interest in denying Clark-Cowlitz the benefit of the municipal preference. With the Electric Consumers' Protection Act, Congress has amended the Federal Power Act so as to remove the municipal preference from all pending relicensing proceedings with one explicit exception: the Merwin project. See **100 Stat. 1243** Sec. 11. Congress has pointedly informed us, with truly unusual specificity, that it has no preference one way or the other as to whether Clark-Cowlitz

receives the benefit of the municipal preference. Thus, retroactive application of the Commission's decision in Merwin could not possibly advance any statutory benefit to offset the considerable harm it would do to Clark-Cowlitz. Cf. Mullins v. Andrus, 664 F.2d 297 , 304 (D.C.Cir.1980) (no statutory objectives to be served where new statutory machinery is in place). Moreover, in this respect, as in respect to its degree of reliance, Clark-Cowlitz is unique among the many municipalities that participated in Bountiful.

The majority nevertheless concludes that there is a statutory interest in retroactive application. The majority reasons that, "[w]ithholding retroactive application would grant Clark-Cowlitz a 30-year benefit to which FERC now believes it is not entitled. The overriding

Congressional interest in ensuring that the best qualified contestant (as FERC sees it) operate hydroelectric power projects, in other words, would not be fulfilled at the Merwin site for three decades." Maj. op. at 1085 (emphasis added). But this no more than restates FERC's decision adverse to Clark-Cowlitz. It in no way speaks to Congress' interest in having the new standard apply retroactively to Clark-Cowlitz. If the agency can simply reiterate its decision on the merits as the statutory interest in retroactive application, then the fifth Retail, Wholesale factor is meaningless. In fact, it is our province to determine whether retroactive application advances the statutory interest and in this case there is an extraordinarily clear answer in the text of the amended Federal Power Act: retroactive application of FERC's interpretation in no way advances Congress' statutory design.

Finally, it must be noted that the majority is not deferring to the Commission's reasoning for applying Merwin retroactively. The Commission offered no reasoning at all. It simply applied its unanticipated reversal to Clark-Cowlitz without giving any consideration whatsoever to prospective application. Indeed, the Commission gave no thought to prospective application even though it determined to overrule Bountiful "so that the correct preference provision will be applied in future relicensing proceedings." Merwin, 25 F.E.R.C. p 61,052, at 61,177 (emphasis added). In supplying reasoning for the Commission, the majority completely ignores that "the law requires that an agency explain ... how it determined that the balancing of harms and benefits favors giving a change in policy retroactive application." Yakima Valley Cablevision, Inc. v. FCC, 794 F.2d 737 , 746 (D.C.Cir.1986). The court at the very least should reverse and remand to the agency for an explanation of its decision. On this ground alone, today's decision is manifestly unjust.

In sum, this is a case in which "the prospectivity side of the scale [is] full and the retroactivity side empty." McDonald v. Watt, 653 F.2d 1035 , 1046 (5th Cir.1981). Moreover, the Commission did absolutely nothing to fulfill its legal obligation to explain why it opted for retroactive application. Under such circumstances, the Commission's application of its new interpretation to Clark-Cowlitz can only be adjudged to be the type of retroactivity which is condemned by law.

The majority also rejects Clark-Cowlitz's argument that principles of collateral estoppel dictate that it have the benefit of the municipal preference in the competition for the Merwin license. My objection to this section of the majority opinion is less with its conclusions than with its premises. In deciding that FERC did not become bound to apply the municipal preference by virtue of the Eleventh Circuit's decision in Alabama Power v. FERC, 685 F.2d 1311 (11th Cir.1982) , cert. denied, **463 U. S. Reports 1230** , 103 S.Ct. 3573 , 77 L.Ed.2d 1415 (1983) , the court is attacking a paper tiger. The more important and interesting issue for purposes of preclusion doctrine is whether Pacific Power & Light is precluded from reaping the benefit of FERC's volte-face by virtue of FERC's decision in Bountiful. I conclude that Pacific Power & Light is so precluded and that Clark-Cowlitz, having once successfully litigated the municipal preference issue with respect to its pending application for the Merwin license, cannot

now be denied the fruits of its earlier victory.

The guiding principle for application of preclusion doctrine to agency adjudications is that "res judicata applies when what the agency does resembles what a trial court does. Such a resemblance or lack of it applies to determinations of law as well as to determinations of fact." K. Davis, 4 Administrative Law Treatise 52 (2d ed. 1983). Bountiful, it will be remembered, was a separate declaratory proceeding that progressed to final judgment. If the Bountiful declaratory proceeding had taken place in federal court, as it certainly could have, the litigants would be bound by the ultimate determination that the municipal preference applies in relicensing proceedings. That is not to say that a court--or in this case FERC--could not later, subject to the principles of stare decisis, decide to adopt the opposite view. But such a subsequent revision could not change the original outcome as to the original parties. If parties' fates could be so put at the mercy of subsequent revision, it would decimate the policies that preclusion doctrine is

designed to advance: protection from the vexation and expense of repetitious litigation, promotion of confidence in the conclusiveness of decisions, and, especially, securing of peace and repose of society. Thus, while FERC may be entitled to change its interpretation of the Federal Power Act, its ability to revise its view does not extend to undoing the preclusive effect of a declaratory order resolving a ripe controversy.

As the majority points out, underlying the rule of issue preclusion is the principle that "one who has actually litigated an issue should not be allowed to relitigate it." Restatement (Second) of Judgments 6 (1982). Yet Clark-Cowlitz and Pacific Power & Light did actually litigate the municipal preference issue in Bountiful. Clark-Cowlitz and Pacific Power & Light were competitors in a pending relicensing hearing that was suspended to resolve the municipal preference issue in a declaratory proceeding. The two parties litigated vigorously--all the way to the Supreme Court--with the reasonable expectation it would resolve the crucial issue in their ongoing controversy. Thus, Clark-Cowlitz and Pacific Power & Light have been afforded an adequate opportunity to litigate a ripe claim before an administrative tribunal. This court therefore does violence to the principles underlying preclusion doctrine by permitting Pacific Power & Light not to be bound by the decision in Bountiful.

The majority argues in one of its footnotes that preclusion should not apply because it was FERC, and not Pacific Power, that changed its position:

Thus, to the extent preclusion analysis is appropriate at all, it is applicable to the extent that FERC participated as a party before the Eleventh Circuit.

Maj. Op. at 1080 n. 5. FERC is the named party in the Eleventh Circuit proceedings and participated fully as it had to do. The issue of municipal preference went to final judgment, and certiorari was denied. Everybody, including FERC, Pacific Power and Clark-Cowlitz, assumed that with the denial of certiorari the issue of municipal preference was finally resolved as to Clark-Cowlitz. The majority's effort to rebut this point raises sophistry to a new pinnacle--surpassed only by the alternative position advanced by the court to justify in general the curious procedures of FERC. If we allowed preclusion, says the court, it would benefit Clark-Cowlitz over the other municipalities that participated in Bountiful --and burden Pacific Power over the other utilities involved in Bountiful. The court even cites the reason for such disparity, but gives it no weight: the passage by Congress of a law which specifically put Clark-Cowlitz and Pacific Power in a category separate from the other parties. It is appropriate that such a rebuttal to the dissent's concerns is expressed in a footnote.

The court's decision also will greatly undermine parties' confidence in the valuable tool of administrative declaratory proceedings. See 5 U.S.C. Sec. 554(e) (1982). Henceforth, parties will be justifiably concerned that such proceedings, even of the scope and effort that characterized Bountiful, may in fact be mere dress rehearsals whose result as to the parties is subject to

complete reversal in a subsequent adjudication. The court's result thus works a substantial disservice to both preclusion doctrine and administrative law.

II.

The question of the merits of FERC's reinterpretation of the Federal Power Act has been rendered virtually academic by virtue of the Electric Consumer Protection Act of 1986, Pub.L. No. 99-495, **100 Stat. 1243** . While carefully excepting the controversy at bar from its provision, Congress now has provided that the municipal preference will not apply to future relicensing proceedings. The majority's analysis of the unamended Federal Power Act, however, suffers from two flaws so substantial that I must dissent from that portion of the opinion as well.

First, in upholding FERC's new interpretation, the majority relies heavily on the distinctions

between entertaining applications for a license--i.e., the process of selecting a licensee--and the process of actually issuing a license. The majority suggests that section 7(a) of the Act must be read to refer to the latter process in order to give full meaning to the statute. In fact, such a reading leaves the statute meaningless. The municipal preference obviously is intended to be used in the decision-making process as a tiebreaking device to select one licensee from among equally well-adapted candidates. It makes no sense to say that FERC can first decide to whom to award a license and then apply the municipal preference to the formal act of issuing the license. The municipal preference must come into play in determining which candidate wins the competition, not in awarding the prize. The majority's analysis on this point is untenable.

The second flaw in the majority's review comes in its determination that the Merwin proceeding arose under the second half of section 7(a)--the "as between other applicants" clause. The majority already has detailed one problem with its interpretation: the second clause of 7(a) refers to "other applicants." The obvious meaning of this phrase is "applicants other than municipal entities," and Clark-Cowlitz is a municipal entity. But there is a more subtle, although no less significant, problem with the majority's analysis. A careful reading of section 7(a) demonstrates that a proceeding cannot arise under the second half of that provision. Section 7(a) first specifies three situations to which it pertains. It then instructs FERC how to proceed in any of these situations, depending on the identity of the applicants. Those instructions are: 1) if an equally well-adapted state or municipality is among the applicants, award it the license; 2) as between other applicants, the Commission may give preference to the best-adapted candidate as defined in the clause. In short, the "as between other applicants" clause refers back to the three situations section 7(a) addresses; it is not a general catch-all clause designed to cover any and all other situations. Thus, FERC's decision to rely on the "as between other applicants" clause as a separate jurisdictional provision, and the court's deference to that decision, are at odds with Congress' statutory scheme.

III.

The rule of law is premised on a concept of reliance. Courts and policymakers have struggled to give full measure to that concept, while recognizing that the results are not always comfortable for society. Retroactivity conflicts are particularly acute when an administrative agency seeks to balance the need for flexibility and change in the administrative law sector with the parties' right to rely on what the agency has said and done previously. Here FERC generated considerable reliance on a rule it then proceeded to reverse without notice. The retroactive application of its new standard to Clark-Cowlitz was unlawful and unreasoned. It also violated well-established principles of preclusion doctrine. Finally, it was premised on a statutory interpretation

that at least in some respects was unreasonable. Although Congress' recent amendment to the Federal Power Act has greatly diminished the scope of the dispute, the court today works a grave disservice to the one municipal applicant who still has a right, preserved by statute, to have its application decided under FERC's prior interpretation.

I dissent.

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* Judge (now Justice) Scalia was a member of the Court at the time this case was argued, but did not participate in this opinion.

** Senior Circuit Judge Wright participated in oral argument of this case, but subsequently recused himself from further participation.

1 Section 7(a) provides as follows:

In issuing preliminary permits hereunder or licenses where no preliminary permit has been issued and in issuing

licenses to new licensees under section 808 of this title the Commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region; and as between other applicants, the Commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plans.

16 U.S.C. Sec. 800(a) (1982). The parties do not dispute that Clark-Cowlitz is a "municipality" for purposes of section 7(a). See id. Sec. 796(7).

2 The court canvassed the legislative history and concluded that it contained only "weak" support for FERC's position (that the preference applied in all relicensings, even those in which the incumbent licensee was seeking to obtain a new license for the project). Alabama Power, 685 F.2d at 1317 . Nonetheless, it accepted FERC's assertion that its interpretation accorded with the language and structure of the statute. At the same time, it acknowledged that the contrary reading proffered by the private utilities (that the preference was inapplicable in relicensings that involved the incumbent) was also "a reasonable interpretation" of the language and structure. Id. at 1316. The court went on to opine in dicta, however, that this reading would lead to "absurd results." Id. at 1316-17. Specifically, it believed that the alternative interpretation championed by the private utilities gave incumbents an undue advantage and left the Commission with no "tie-breaking" preference to apply in certain situations. Id. But cf. Pacific Power & Light Co., 25 F.E.R.C. p 61,052, at 61,184-85 (1983) (asserting that no such absurd result obtained under this interpretation).

3 Section 2 of the 1986 Act amends section 7(a) of the Federal Power Act, quoted in full supra note 1, so that 7(a) now begins as follows:

In issuing preliminary permits hereunder or original licenses where no preliminary permit has been issued, [and in issuing licenses to new licensees under section 808 of the title] the Commission shall....

ECPA, Sec. 2, **100 Stat. 1243** (additions italicized; deletions bracketed). Section 11 of the ECPA provides in relevant part:

The amendments made by this Act ... shall not apply to the Federal Energy Regulatory Commission proceeding involving FERC Project Number 935 (FERC Project Number 2791), relating to the Merwin Dam in Washington State.

Id. Sec. 11.

4 It is irrelevant to preclusion analysis that in dicta the Eleventh Circuit suggested that the interpretation now taken by FERC would lead to absurd results. See supra note 2. Preclusion attaches only to issues the resolution of which is necessary to support the judgment in the first action. See, e.g., Synanon Church v. United States, 820 F.2d 421 , 424 (D.C.Cir.1987); Jack Faucett Assocs., 744 F.2d at 125 ; Association of Bituminous Contractors, Inc. v. Andrus, 581 F.2d 853 , 860 (D.C.Cir.1978); 18 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure Sec. 4421 (1981). Under the deferential standard of review employed by the reviewing court, it had only to determine the reasonableness of FERC's prior interpretation, not the correctness of competing interpretations. The same reasoning applies if we treat Clark-Cowlitz's argument in terms of claim preclusion. The present "claim"--that FERC's present interpretation of section 7(a) is incorrect--could not have been entertained by the Eleventh Circuit before FERC adopted this interpretation. Cf. I.A.M. National Pension Fund, 723 F.2d at 947-49 .

5 The dissent's argument that the real issue of preclusion is whether Pacific Power should be bound by Bountiful is, with all respect, misguided. It is true as a general matter that preclusion principles can apply to parties to administrative proceedings, but that principle is irrelevant here. The doctrine of preclusion is meant to prevent parties from rearguing issues they have already lost. But Pacific Power has never argued that Bountiful did not apply to it. It was the decisionmaker, FERC, that changed its position. Thus, to the extent preclusion analysis is appropriate at all, it is applicable to the extent that FERC participated as a party before the Eleventh Circuit. Preclusion principles are meant to provide an affirmative defense that one party to a prior proceeding may raise against another party that took an adverse position in that proceeding.

Assuming arguendo the appropriateness of addressing whether Pacific Power should be precluded by virtue of its participation, we would reach the same conclusion. Bountiful was, it must be remembered, a declaratory order proceeding, see 5 U.S.C. Sec. 554(e), and as such was structured expressly in order to address a pure issue of law: the applicability of the municipal preference of section 7(a) to relicensing. See Bountiful, 11 F.E.R.C. at 61,710. It is well settled that the determination of an issue of law should not be accorded preclusive effect if such effect would result in "inequitable administration of the law." See Restatement (Second) of Judgments Sec. 28(a); see also Staten Island Rapid Transit Operating Auth. v. ICC, 718 F.2d 533 , 542 (2d Cir.1983). We think that would be the precise

consequence of applying preclusion in this case for the reason we discuss infra section III. It would grant Clark-Cowlitz a benefit which similarly situated parties--namely, the numerous other municipalities who participated in Bountiful--would be denied by virtue of passage of the Electric Consumers Protection Act. Correlatively, it would

burden a party, Pacific Power, in a way that similarly situated parties--namely, the numerous private utilities in Bountiful--would not be burdened.

Moreover, the dissent's attempt to equate Bountiful with ordinary federal court proceedings ignores the fact that administrative proceedings vary much more widely than judicial proceedings. Since as a general matter preclusion principles are to be applied more flexibly to administrative adjudications than to judicial proceedings, see generally Restatement (Second) of Judgments Sec. 83; 4 K. Davis Sec. 21:9, withholding preclusive effect as to a single party is especially justified in light of the unique nature of the Bountiful proceedings and the scope of participation in those proceedings by private parties.

6 The Retail, Wholesale court somewhat misleadingly refers to this first factor as an inquiry whether the agency adjudication at issue is one of "first impression." This nomenclature contains within it seeds of confusion, insofar as it differs from the more typical understanding of the term as referring to situations in which an agency confronts an issue that it has not resolved before. See, e.g., SEC v. Chenery, **332 U. S. Reports 194** , 202-03, 67 S.Ct. 1575 1580, 91 L.Ed. 1995 (1947) . Nonetheless, this potential confusion is quickly dispelled upon examination of the facts of Retail, Wholesale. There the Retail, Wholesale court labeled the case before it one of second impression and on that basis distinguished it from the agency decision, The Laidlaw Corporation, 171 NLRB No. 175 (June 13, 1968), in which the NLRB first overruled a well-established rule to the contrary. In discerning this distinction, the court clearly labelled Laidlaw a case of "first impression" for purposes of analysis under the first factor, even though Laidlaw addressed an issue which the agency had addressed before:

First, while the Supreme Court has observed in Chenery that "[E]very case of first impression has a retroactive effect ...," this is not a case of first, but of second impression. The case in which the rule in question was adopted by the Board was Laidlaw itself, and, although the Seventh Circuit upheld its application to the employer there, it must be recognized that "[t]he problem of retroactive application has a somewhat different aspect in cases not of first impression but of second impression."

466 F.2d at 390 (footnotes and citations omitted). It could not be clearer that Laidlaw was not a decision of the sort typically referred to as one of "first impression"--that is, it was not the first time that the NLRB had ever addressed the issue (whether an employer had to seek out affirmatively and offer reinstatement to employees replaced during an unfair labor practice strike). Rather, Laidlaw was one of "first impression" in a different sense, namely that it decided for the first time that employers did in fact have a duty to seek out and offer to reinstate such employees. In announcing this rule, the Laidlaw decision squarely overruled numerous NLRB decisions that had addressed this same issue but reached the opposite result. Id. at 387-88 & n. 17. Thus, the dissent misinterprets the term "first impression" as used in Retail, Wholesale in concluding that Merwin was "a classic example of a case of second impression." Dissent at 1094. Merwin clearly qualifies as a case of first impression under the Retail, Wholesale analysis, which, the dissent acknowledges, is the "seminal case fixing the law of the circuit for retroactive application of agency adjudications." Id. at 1093.

The dissent goes on to suggest that the first factor of Retail, Wholesale loses meaning if a case enunciating a new rule is viewed as a case of "first impression." Id. at 1094. But the apparent conceptual oddity disappears when one focuses not upon the nomenclature, which is indeed misleading, but on the concept which the Retail, Wholesale court was seeking to convey. And that point was well captured by the court's observation that parties who challenge old doctrines should be rewarded for bringing about the change in the law. That is, to deny the fruits of victory to those who bring about a change in the law "might have adverse effects on the incentive of litigants to advance new theories or to challenge outworn doctrines." Id. at 390. Thus, we are convinced that the dissent, with all respect, has been misled by the admittedly misleading nomenclature employed by the Retail, Wholesale court, and has overlooked the real point--the first factor points in favor of retroactive application of a rule in the adjudication in which the new rule or principle is announced. Odd as it may seem to the dissent, the first factor tends by its nature to cut in favor of retroactive application of a new principle. That factor, however, can obviously be counterbalanced by the weight of the other factors, which boil down, as we shall presently see, to a question of concerns grounded in notions of equity and fairness.

7 Consideration of Hanover Shoe, **392 U. S. Reports 481** , 88 S.Ct. 2224 , 20 L.Ed.2d 1231 , illustrates the fundamental defect in the dissent's analysis of this case under the second Retail, Wholesale factor. In Hanover Shoe, the Court assessed whether "a party ha[d] significantly relied upon a clear and established doctrine" so as to warrant nonretroactive application of a judicially articulated rule concerning the law of monopolization. Id. at 496, 88 S.Ct. at 2223 . It surveyed case law extant when the rule was first clearly announced and determined that there was no "sharp break in the line of earlier authority or an avulsive change which caused the current of the law thereafter to flow between new banks." Id. at 499, 88 S.Ct. at 2234 . Just as the second Retail, Wholesale factor looks to whether there has been a departure from past practice, 466 F.2d at 390 , the Hanover Shoe Court's use of terms like "line of authority" and "current of the law" demonstrates that retroactivity analysis must consider the "longstanding" nature of the displaced prior rule. And that is why a holding of nonretroactivity, as urged by the dissent, cannot be premised on a single, recent agency decision (Bountiful) that is still in the throes of litigation when it is overruled. It is precisely those situations in which a preexisting rule has withstood the test of time and been faithfully applied or explicitly reaffirmed that justifiable reliance may exist. To this extent, the dissent's suggestion, Dissent at 6, that the three-year interval between Bountiful and Merwin is somehow comparable to the seven years of decisions overruled by the Laidlaw decision at issue in Retail, Wholesale, see supra note 6, is simplistic and misleading. The prior rule at issue in Retail, Wholesale had been applied and confirmed in at least six decisions over those seven years, 466 F.2d at 387

n. 17 (listing cases), five of which held up to judicial review. That is a far cry from the situation here.

8 In fact, prior to Bountiful, the only indication of how this legal issue would be resolved cut against a municipality's reliance on the availability of the preference. That indication had come in 1967, when the General Counsel of the Federal Power Commission, FERC's predecessor, informed Congress that the FPC interpreted section 7(a) to withhold the municipal preference in relicensing proceedings in which the incumbent licensee was seeking the license. See Bountiful, 11 F.E.R.C. at 61,722-23.

9 The dissent's attempt to ignore the significance of this disclosure and maintain that the overruling of Bountiful was "completely unforeshadowed," Dissent at 9, blinks at reality. The Solicitor General's certiorari brief clearly and unequivocally foreshadowed Bountiful 's demise when it gave notice to Clark-Cowlitz as well as the Court that "a majority of the [FERC] Commissioners ... expressed their disagreement with the Commission's earlier position [in Bountiful]" and that "the Commission now wishes to reconsider the case [Bountiful], and ... a majority of the Commissioners appear to be ready to overrule [Bountiful] and adopt the contrary position." Solicitor General's Brief in Support of Certiorari at 8-9, J.A. at 106-07. In light of this clear indication that Bountiful was in mortal danger, it is irrelevant for purposes of gauging reasonable reliance that the Commission, as a litigation matter, expressed concern over the possible binding effect of Bountiful. This latter concern was merely that; it scarcely negates the expression of intent to overrule Bountiful. What is more, this articulated concern must be viewed in its context, namely as part of the Commission's litigation strategy. It cannot be overlooked that at that juncture the Commission was fervently seeking to convince the Supreme Court that the case was worthy of the Court's attention. Thus, assuming arguendo that Clark-Cowlitz expended time and money toward securing a hearing after May 1983 (when the Solicitor General revealed the Commission's forthcoming change in interpretation), that effort simply cannot be said to have been in "reasonable reliance" on the continued vitality of Bountiful. We are thus left with whatever efforts born of optimism may have taken place over six months, which the dissent itself describes as "admittedly ... modest." Dissent at 1095.

10 For reasons stated in the text, the dissent is wrong to describe the effect of retroactive application as "[d]eprivation of that license," Dissent at 1097, since Clark-Cowlitz still could have received the license if it had been better qualified than Pacific Power. Moreover, the dissent ignores the bedrock fact that Clark-Cowlitz never received a license. All Clark-Cowlitz ever had was a favorable ruling from an ALJ, which was subject to plenary review by the full Commission. Finally, it is worth emphasizing that although Clark-Cowlitz was, as the dissent notes, formed for the express purpose of seeking the Merwin license, its failure to obtain that license was a risk it undertook knowingly; the Authority was formed, after all, when prevailing authority suggested that it was entitled to no preference. See supra note 8.

11 We are puzzled by the dissent's discounting FERC's view of Congress' interest with respect to hydroelectric relicensings. See Dissent at 1098. FERC did, after all, reach its decision as a result of a careful examination of the relevant statutory framework and legislative history surrounding it; it was not engaging in policy making. We are, of course, obliged when Congress' intent is not clear and unambiguous to defer to an agency's reasonable interpretation of that intent. See Chevron U.S.A. Inc. v. Natural Resources Defense Council, **467 U. S. Reports 837** , 844-45, 104 S.Ct. 2778 , 2782-83, 81 L.Ed.2d 694 (1984) ; see also INS v. Cardoza-Fonseca, --- U.S. ----, 107 S.Ct. 1207 , 1220-21, 94 L.Ed.2d 434 (1987) ; Clarke v. Securities Indus. Ass'n, --- U.S. ----, 107 S.Ct. 750 , 759-60, 93 L.Ed.2d 757 (1987) ; United States v. Riverside Bayview Homes, **474 U. S. Reports 121** , 106 S.Ct. 455 , 461, 88 L.Ed.2d 419 (1985) ; Chemical Mfrs. Ass'n v. Natural Resources Defense Council, **470 U. S. Reports 116** , 125, 105 S.Ct. 1102 1108, 84 L.Ed.2d 90 (1985) . Equally important, Congress' statutory interest in awarding the license to the best qualified applicant, an interest discerned by the Commission in an interpretation that we consider reasonable, see infra section IV, would not be fulfilled at least at the Merwin site for three decades if nonretroactive application of Merwin is required. The need immediately to announce and apply its reinterpretation of Bountiful obviously occurred to FERC, as is evident from the outset of the Merwin decision. FERC acknowledged that "it [did] not matter whether the municipal preference ... [was] applied [to the case before it] because the Commission is in full agreement that the plans of PP & L are better adapted than those of [Clark-Cowlitz] and, consequently, that there [was] no tie." This overruling was obviously necessary because after the round of relicensings then under way, no more adversary relicensings would take place for three decades, as all the parties to Bountiful and Merwin were undoubtedly aware. Since eight of the "future" relicensings were already pending, as FERC noted, if the Commission had decided to postpone announcing its overruling of Bountiful, or to withhold retroactive application, its new interpretation would not be applied to nine different sites for thirty years. The dissent now appears to criticize FERC for not considering singling out Clark-Cowlitz for nonretroactive application of Merwin at the expense of the eight other applicants. See Dissent at 1098. We believe that this was hardly an "obvious alternative," cf. Yakima Valley, 794 F.2d at 746 . For one thing, as we discuss in the text, Clark-Cowlitz demonstrated no unique degree of reliance or hardship sufficient to justify such disparate treatment. For another, this alternative was not so "obvious" as to occur to Clark-Cowlitz itself, which argued in its petition for rehearing that FERC was bound to apply Bountiful to all parties to Bountiful, comprising "virtually the entire investor-owned utility industry and a substantial number of publicly-owned utilities." See Clark-Cowlitz's Request for Rehearing of Opinion No. 191, at 10 (Nov. 4, 1983), J.A. at 708, 725; see also id. at 17-19, J.A. at 732-34 (discussing retroactivity principles without suggesting that Clark-Cowlitz should be singled out for favorable treatment).

12 We in no way suggest that Congress' most recent legislation controls our decision concerning Clark-Cowlitz's entitlement to the municipal preference. We recognize that in enacting the ECPA Congress deliberately left to this court resolution of the pending controversy involving FERC and Clark-Cowlitz. See, e.g., H.R.Rep. No. 507, 99th Cong., 2d Sess. 16-17 (1986), U.S.Code Cong. & Admin.News 1986, p. 2496; see also supra note 3. We only

emphasize that considerations of fairness, which lie at the heart of exceptions to the general rule of retroactivity, militate against treating Clark-Cowlitz differently from the many similarly situated municipalities subject to Congress's enactment.

13 Section 807(b) provides in relevant part as follows:

No earlier than five years before the expiration of any license, the Commission shall entertain applications for a new license and decide them in a relicensing proceeding pursuant to the provisions of section 808 of this title....

16 U.S.C. Sec. 807(b).

14 The dissent misreads our opinion "to say that FERC can first decide to whom to award a license and then apply the municipal preference to the formal act of issuing the license," Dissent at 1100. Not so. As FERC reads section 800(a), the municipal preference applies only in relicensing proceedings in which the Commission is "issuing a license to a new licensee," which can only include contests among applicants who are not "original licensees." This reading by the expert agency does not, as the dissent would have it, require application of the preference only after the decision is made as to who gets the award. The Commission obviously knows from the outset whether an original licensee is participating in the proceeding. Employing its misreading of our opinion, the dissent then attempts to justify modifying the language of section 800(a). The dissent would twist the statute so as to trigger the municipal preference in any relicensing proceeding in which a state or municipality has filed an application to become a new licensee--i.e., where the Commission is "entertaining" an application, 16 U.S.C. Sec. 807(b), supra note 13, for the issuance of a license to a new licensee. We believe FERC's contrary interpretation is at least as reasonable as, if not preferable to, an interpretation that requires amending the statute to add language that Congress saw fit to leave out of this provision and chose to use elsewhere, indeed in a neighboring provision. See id.

15 We need not dwell at length on the dissent's belief that this particular portion of section 7(a), 16 U.S.C. Sec. 800(a), yields an "obvious" meaning. See Dissent at 1100. We think the susceptibility of this provision to varying but reasonable interpretations is suggested by the fact that interpretation of this provision has, so far (1) been the subject of two lengthy and careful Commission decisions reaching contrary results; (2) provided a subject of fierce debate among "virtually the entire" industry, see Clark-Cowlitz's Rehearing Petition, supra note 11, at 10; and (3) led to judicial review by this court sitting en banc with differences of opinion.

As for the "more subtle" problem that the dissent purports to discern in FERC's interpretation of section 7(a), that "problem" is nothing more than a recasting of the dissent's first problem concerning the phrase "as between other applicants," which we acknowledge in the text to be ambiguous. The dissent asserts that "a proceeding cannot arise under the second half of [section 7(a)]," Dissent at 1100, which is itself a remarkable proposition inasmuch as it appears to deny meaning to fully one-half of the provision. It appears to us that under either of the competing interpretations a relicensing proceeding in which no municipality was involved would require application of the second half of section 7(a). But in any event, in asserting that the first half of section 7(a) covers all possible proceedings, the dissent simply presumes the correctness of its interpretation, namely that "new licensees" includes "original licensees." Such judicial presumptions are not, with all respect, in keeping with Chevron principles.

16 The Commission canvassed this lengthy, largely inconclusive history in both Bountiful, 11 F.E.R.C. at 61,712-25 (1980), and Merwin, 25 F.E.R.C. at 61,180-84, J.A. at 620-26.

17 Section 10(a) of the Federal Power Act provides in relevant part as follows:

All licenses issued under this subchapter shall be on the following conditions:

(a) ... That the project adopted ... shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for beneficial public uses, including recreational purposes....

16 U.S.C. Sec. 803(a).

EXHIBIT 39

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Contel of the South, Inc. d/b/a Verizon Mid-States, Verizon California Inc., The Micronesian Telecommunications Corporation, Verizon Delaware Inc., Verizon Florida Inc., Verizon Maryland Inc., Verizon New England Inc., Verizon New York Inc., Verizon New Jersey Inc., Verizon North Inc., Verizon Northwest Inc., Verizon South Inc., Verizon Pennsylvania Inc., GTE Southwest Inc., Verizon Washington, D.C. Inc., and Verizon West Virginia, Inc.,	)	File No. EB-05-MD-007
	)	
Complainants,	)	
	)	
v.	)	
	)	
Operator Communications, Inc.,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Adopted: December 21, 2007 **Released: January 4, 2008**

By the Commission: Commissioner Copps concurring and issuing a statement.

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we grant in part a formal complaint[1] filed by the Verizon Telephone Companies[2] against Operator Communications, Inc. ("OCI") pursuant to section 208 of the Communications Act of 1934, as amended ("Act").[3] Verizon alleges that OCI violated sections 201 and 276 of the Act[4] by failing to pay Verizon payphone compensation required by sections

[1] Formal Complaint of Verizon, File No. EB-05-MD-007 (filed May 13, 2005) ("Complaint").

[2] Contel of the South, Inc. d/b/a Verizon Mid-States, Verizon California Inc., The Micronesian Telecommunications Corporation, Verizon Delaware Inc., Verizon Florida Inc., Verizon Maryland Inc., Verizon New England Inc., Verizon New York Inc., Verizon New Jersey Inc., Verizon North Inc., Verizon Northwest Inc., Verizon South Inc., Verizon Pennsylvania Inc., GTE Southwest Inc., Verizon Washington, D.C. Inc., and Verizon West Virginia, Inc. *See* Revised Joint Statement of Stipulated Facts, Disputed Facts, and Key Legal Issues, File No. EB-05-MD-007 (filed Aug. 8, 2005) ("Revised Joint Statement") at 2, ¶ 4.

[3] 47 U.S.C. § 208.

[4] 47 U.S.C. §§ 201, 276.

64.1301(a) and (c) of the Commission's rules,[5] and by failing to pay certain presubscribed interexchange carrier ("PIC") charges imposed in Verizon's tariff. For the reasons discussed below, we grant Verizon's Complaint with respect to Commission rules 64.1301(a) and (c), and order OCI to pay damages in the amount of such compensation due, plus interest. We dismiss Verizon's PIC charges claim without prejudice to filing in an appropriate forum on the ground that it is a collections action and thus not cognizable under the Act.

II. BACKGROUND

2. At all relevant times, Verizon was a Local Exchange Carrier ("LEC") and a payphone service provider ("PSP").[6] OCI was the PIC for thousands of payphones in the United States, including payphones owned by Verizon.[7]

3. Section 276 of the Act directs the Commission to "establish a per call compensation plan to ensure that all [PSPs] are fairly compensated for each and every completed intrastate and interstate call using their payphone . . . ."[8] Pursuant to section 276, the Commission established a per call compensation scheme, *inter alia*, for access code and subscriber 800 (collectively "dial-around") calls, and 0+ calls.[9] An "access code" call is a payphone call in which the caller dials a sequence of numbers that connects the caller to an interexchange carrier ("IXC") other than the payphone's PIC.[10] A "subscriber 800 call" is a payphone call to an 800 number assigned to a particular subscriber.[11] A "0+ call" is a payphone call in which the caller dials "0" plus the called number. A 0+ call is always automatically routed to the payphone's PIC.[12]

4. The Commission's per call compensation plan did not take effect, however, until October 7, 1997, the date on which carriers were required to install the call tracking technology necessary to

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[5] 47 C.F.R. § 64.1301(a), (c).

[6] Revised Joint Statement at 2, ¶¶ 2, 4.

[7] Revised Joint Statement at 2, ¶ 2; Complaint at 2, ¶ 2; Initial Brief of Operator Communications, Inc., File No. EB-05-MD-007 (filed Sept. 23, 2005) ("OCI Initial Br."), Exhibit 10 (Interrogatory and Document Request Responses) at Exhibit C (Table).

[8] 47 U.S.C. § 276(b)(1)(A).

[9] *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report and Order, 11 FCC Rcd 20541 (1996) (subsequent history omitted) ("*First Payphone Compensation Order*"); *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Fourth Order on Reconsideration and Order on Remand, 17 FCC Rcd 2020 (2002) (subsequent history omitted) ("*Fourth Payphone Compensation Order*"); *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Fifth Order on Reconsideration and Order on Remand, 17 FCC Rcd 21274 (2002) (subsequent history omitted) ("*Fifth Payphone Compensation Order*").

[10] *First Payphone Compensation Order*, 11 FCC Rcd at 20549, ¶ 16 n.34.

[11] *First Payphone Compensation Order*, 11 FCC Rcd at 20549, ¶ 16 n.35. "[T]he term 'subscriber 800 calls' includes other sequences of numbers that the FCC deems, or may deem in the future, the equivalent of subscriber 800 numbers, such as numbers with an '888' code." *Id.*

[12] *Fourth Payphone Compensation Order*, 17 FCC Rcd at 2028, ¶ 21. 0+ calls include collect, credit card, and third number billing calls. *See First Payphone Compensation Order*, 11 FCC Rcd at 20549, ¶ 16 n.33.

implement the plan. Until that time, for the period April 16, 1997 to October 6, 1997 (the "Interim Period"), the Commission determined that PSPs would be compensated for dial-around and 0+ calls on a per-payphone basis.[13] Accordingly, the Commission promulgated rules 64.1301(a) and (c), obligating certain carriers to compensate PSPs for Interim Period dial-around and 0+ calls "per payphone per month."[14]

III. DISCUSSION

A. OCI's Failure to Pay Interim Period Dial-Around Compensation Violates Section 201(b) of the Act.

5. We conclude that OCI violated section 201(b) of the Act by failing to pay Verizon dial-around compensation as required by Commission rule 64.1301(a).[15] That rule provides:

> In the absence of a negotiated agreement to pay a different amount, each entity listed in Appendix A of the [*Fifth Payphone Compensation Order*] must pay default compensation to [PSPs] for [dial-around] calls for the [Interim Period] in the amount listed in Appendix A per payphone per month.[16]

As explained in the *Fifth Payphone Compensation Order*, Appendix A allocates Interim Period dial-around compensation to each of the carriers listed by estimating that carrier's proportionate share of the payphone calls market during the Interim Period.[17] OCI's assigned share is $0.01776232 per payphone.[18]

6. The parties have stipulated that they did not have a negotiated agreement governing Interim Period compensation for dial-around calls, and that OCI has not compensated Verizon for any such calls.[19] In addition, the parties agree as to the number of Verizon payphones that were in service during the Interim Period.[20] Accordingly, Verizon has established each element of its rule 64.1301(a)

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[13] *See Fourth Payphone Compensation Order*, 17 FCC Rcd at 2020-22, ¶¶ 1-4; *Fifth Payphone Compensation Order*, 17 FCC Rcd at 21276-79, ¶¶ 2-9.

[14] 47 C.F.R. § 64.1301(a), (c).

[15] *See* Complaint at 13, ¶ 50 (alleging that OCI's failure to pay rule 64.1301(a) compensation violates sections 201 and 276 of the Act, and "Commission orders concerning payphone compensation.") *See also Global Crossing Telecomm. v. Metrophones Telecomm.*, 127 S.Ct. 1513, 1520 (2007) (refusing to pay payphone compensation required by Commission rules violates section 201(b) of the Act).

[16] 47 C.F.R. § 64.1301(a).

[17] *Fifth Payphone Compensation Order*, 17 FCC Rcd at 21289, ¶¶ 47-48.

[18] *See Fifth Payphone Compensation Order*, 17 FCC Rcd at 21313 (stating that OCI is to pay $0.01772023 per payphone per month) and 21315 (stating that ONCOR Communications is to pay $0.00004209 per payphone per month). OCI admits, for the purposes of this litigation, that it is responsible for the obligations attributed to "ONCOR Communications" in Appendix A. *See* Revised Joint Statement at 7, ¶ 34.

[19] *See* Revised Joint Statement at 5, ¶¶ 25-26, 8-9, ¶¶ 38, 40-41. *See* Complaint, Tab F (Fouke Decl.) at 3, ¶ 9.

[20] Specifically, the parties agree that, (i) 493,230 Verizon payphones were in service in the second quarter of 1997, (ii) 479,272 Verizon payphones were in service in the third quarter of 1997, and (iii) 514,895 Verizon payphones were in service in the fourth quarter of 1997. *See* Final [sic] Brief in Support of Verizon's Complaint, File No. (continued....)

claim.

7. OCI's defenses to this claim lack merit. First, OCI argues that Verizon "may not use the Commission's complaint process to collect debts . . . owed by customers for tariffed charges."[21] The Commission has distinguished between rules that impose an obligation to pay, and rules that merely permit a carrier to levy a charge. Failure to pay pursuant to the former is actionable under the Act, while failure to pay in the latter instance is not.[22] In the "collections action" cases on which OCI relies, the complainant sought amounts allegedly owed solely pursuant to tariff and, for that reason, did not state a claim for violation of the Act or Commission rules.[23] In this case, however, Verizon seeks to enforce compensation obligations explicitly imposed upon IXCs by Commission rules, and thus may bring the case here. The Commission has stated that, "failure to pay [payphone compensation] in accordance with the Commission's payphone rules ... constitutes both a violation of section 276 and an unjust and unreasonable practice in violation of section 201(b) of the Act."[24]

8. OCI further contends that rule 64.1301(a) is unlawful because it is retroactive. Specifically, OCI argues that, "for the duration of what is now referred to as the Interim Period and through 2002, no effective FCC rules established a payphone compensation obligation from IXCs."[25] Therefore, according to OCI, the promulgation of these rules in 2002 (with the release of the *Fifth Payphone Compensation Order*) is improper retroactive rulemaking.[26] This very argument, however,

(Continued from previous page)
EB-05-MD-007 (filed Sept. 23, 2005) ("Verizon Initial Br.") Attachment 4 (Joint Statement of Additional Stipulated Facts) at 1, ¶ 1.

[21] Answer and Affirmative Defenses of Operator Communications, Inc., File No. EB-05-MD-007 (filed June 23, 2005) ("Answer"), Tab D (Legal Analysis) at 12-13 (citing *Illinois Bell Telephone Co. v. AT&T*, Memorandum Opinion and Order, 4 FCC Rcd 5268, *recon. denied*, 4 FCC Rcd 7759 (1989), *Beehive Telephone, Inc. v. Bell Operating Cos.*, Memorandum Opinion and Order, 10 FCC Rcd 10562 (1995), and *Long Distance/USA, Inc. v. Bell Telephone Co. of Pa.*, Memorandum Opinion and Order, 7 FCC Rcd 408 (Com. Carrier Bur. 1992)); OCI Initial Br. at 32-34 (same).

[22] *See U.S. TelePacific Corp. v. Tel-America of Salt Lake City, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 24552, 24556 n.28 (2004) ("[T]he Commission does entertain claims to recover unpaid payphone compensation pursuant to section 276 of the Act . . . and sections 64.1300 through 64.1320 of the Commission's rules . . . . Unlike the statutory provisions and Commission rules regarding access charges – which speak only to the duties of the charging carrier and not to the duties of the customer – section 276 of the Act and section 64.1300 of the Commission's rules specifically impose an obligation on the 'customer' to pay payphone compensation charges. Therefore, a failure to pay payphone compensation charges constitutes a violation of the Act itself, which is actionable under section 208.")

[23] *See Illinois Bell Telephone Co.*, 4 FCC Rcd at 5270, ¶¶ 15-18 (dismissing complaints alleging that defendant failed to pay tariffed rates for special access services on the ground that the Commission's complaint procedure is not "a collection mechanism for carriers"); *Beehive Telephone, Inc.*, 10 FCC Rcd at 10569, ¶ 37, n.90 (dismissing cross-complaint for amounts billed pursuant to tariff); *Long Distance/USA, Inc.*, 7 FCC Rcd at 412, ¶ 13 (dismissing cross-complaint seeking payment for tariffed switched access service charges). *See generally U.S. Telepacific Corp.*, 19 FCC Rcd 24552.

[24] *In re Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report and Order, 18 FCC Rcd 19975, 19990, ¶ 32 (2003) (subsequent history omitted). *Accord APCC Services, Inc. v. NetworkIP, LLC*, Order on Review, 21 FCC Rcd 10488, 10494-95, ¶ 16 (2006). *See Global Crossing Telecomm.*, 127 S.Ct. at 1520 (violation of Commission payphone compensation rules violates section 201(b)).

[25] Answer Tab D (Legal Analysis) at 3-4.

[26] *See* Answer Tab C (Summary) at i, Tab D (Legal Analysis) at 2-5, Tab E (Answer and Affirm. Defenses) at 14-15, ¶¶ 76-78.

was considered and rejected by the Commission in the *Fourth* and *Fifth Payphone Compensation Orders*, and thus this defense is conclusively precluded. As the Commission explained there, it was not engaged in retroactive rulemaking, but rather was implementing the mandate of the D.C. Circuit, which directed the Commission to set a new interim rate for dial-around compensation.[27]

9. Verizon therefore has established that it is entitled to rule 64.1301(a) compensation from OCI. The parties in this case have stipulated to the amount of compensation owed to Verizon. Specifically, the parties agree that, if the number of Verizon payphones in service during the Interim Period is applied to the dial-around compensation amount attributed to OCI in Appendix A of the *Fifth Payphone Compensation Order*, OCI's liability to Verizon pursuant to rule 64.1301(a) is $49,503 before the application of interest.[28] We so find.[29]

B. OCI's Failure to Pay Interim Period 0+ Compensation Violates Section 201(b) of the Act.

10. We also conclude that OCI violated section 201(b) of the Act by failing to pay Verizon 0+ compensation pursuant to Commission rule 64.1301(c).[30] That rule provides:

> In the absence of a negotiated agreement to pay a different amount, if a [PSP] was not compensated for 0+ calls originating during the [Interim Period],.... an [IXC] to which the payphone was presubscribed during this same time period must compensate the [PSP] in the default amount of $4.2747 per payphone per month during the same time period ....[31]

It is well established that the complainant in a section 208 formal complaint proceeding has the burden of establishing, by a preponderance of the evidence, that the defendant has violated the Act or Commission rules or orders.[32] Verizon and OCI stipulate that they have not negotiated an agreement governing compensation for 0+ calls, and that OCI has not paid Verizon any Interim Period 0+ compensation.[33] Verizon further submitted uncontroverted evidence that it received no compensation for the 0+ calls at

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[27] *See Fourth Payphone Compensation Order*, 17 FCC Rcd at 2022, ¶ 5 n.18; *Fifth Payphone Compensation Order*, 17 FCC Rcd at 21294, ¶ 62 (citing *Ill. Pub. Telecomm. Ass'n v. FCC*, 117 F.3d 555, 565, *clarified on reh'g*, 123 F.3d 693 (D.C. Cir. 1997), *cert. denied sub nom. Virginia State Corp. Comm'n v. FCC*, 523 U.S. 1046 (1998), in which the court, in vacating the Commission's rule governing compensation for dial-around calls, stated, "The FCC must now set a new interim rate ...").

[28] *See* Verizon Initial Br. Attachment 4 (Joint Statement of Additional Stipulated Facts) at 1, ¶ 2.

[29] Because Verizon will receive all the relief to which it is entitled under section 201(b) of the Act, we dismiss without prejudice Verizon's claims under section 276 of the Act and Commission orders.

[30] *See* Complaint at 13, ¶ 47 (alleging that OCI's failure to pay rule 64.1301(c) compensation violates sections 201 and 276 of the Act, and "Commission rules concerning OCI's payphone compensation").

[31] 47 C.F.R. § 64.1301(c).

[32] *Hi-Tech Furnace Systems, Inc. v. FCC*, 224 F.3d 781, 787 (D.C. Cir. 2000) (affirming the Commission's decision to impose the burden of proof on the complainant). *See Consumer.Net v. AT&T Corp*, Order, 15 FCC Rcd 281, 284-85, ¶ 6 (1999); *Implementation of the Telecommunications Act of 1996, Amendment of Rules Governing Procedures to be Followed when Formal Complaints are Filed Against Common Carriers*, Report and Order, 12 FCC Rcd 22497, 22615, ¶ 291 (1997).

[33] *See* Revised Joint Statement at 5, ¶¶ 25-26.

issue here that originated during the Interim Period.[34] The parties disagree, however, as to the number of Verizon payphones that were presubscribed to OCI during the Interim Period.

11. In order to calculate the amount of 0+ compensation owed, Verizon relies on OCI records establishing, for each month of the Interim Period, the number of Verizon payphones that delivered at least one 0+ call to OCI.[35] OCI concedes that a payphone that delivered a 0+ call to OCI in a particular month must have been presubscribed to OCI for at least some portion of that month, because all 0+ calls are automatically routed to the payphone's PIC.[36] Based on this evidence, Verizon proffers three alternative methods for calculating the number of Verizon payphones presubscribed to OCI. We find that Verizon's third method accurately calculates the number of such payphones.

12. First, Verizon asks us to assume that if a Verizon payphone delivered at least one 0+ call at any time during the Interim Period, it must have been presubscribed to OCI for the entire five and a half months of that period.[37] Because the rules require monthly compensation regardless of whether any 0+ calls are carried, Verizon contends that OCI owes default compensation for each of those phones for each month of the Interim Period.[38] OCI argues, on the other hand, that the Verizon payphones could have changed PICs at any time during the Interim Period because the IXC market was highly competitive, slamming was pervasive and OCI's market share was in decline.[39] Though Verizon is correct that compensation is due regardless of whether 0+ calls were made, the conclusion that a phone was presubscribed to OCI for the entire five and a half month period based on a single call is too attenuated, and we decline to base an award of 0+ compensation on this assumption. As OCI notes, "'where an issue is left in doubt by proof so that a trier of fact would be required to speculate, the party on which the burden of proof ultimately rests must lose.'"[40]

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[34] *See* Complaint, Tab F (Fouke Decl.) at 3, ¶ 9.

[35] *See* Verizon Initial Br. at 2 and Attachment 3 (Fouke Decl.) at 2-3, ¶¶ 5-7; Opposition Brief of Verizon, File No. EB-05-MD-007 (filed Oct. 7, 2005) ("Verizon Opp. Br.") at 3; Reply Brief of Verizon, File No. EB-05-MD-007 (filed Oct. 14, 2005) ("Verizon Reply Br.") at 1; OCI Initial Br. at 30-31, Exhibit 10 (OCI's Responses to Interrogatory and Document Production Requests) at 2-3. Specifically, in each month of the Interim Period, OCI carried at least one 0+ call from the following number of Verizon payphones: April: 21,513 payphones; May: 21,970 payphones; June: 21,424 payphones; July: 20,721 payphones; August: 20,033 payphones; September: 18,738 payphones; and October: 18,456 payphones. *Id.* OCI subsequently stated that its initial calculation was incorrect, and that it carried a slightly smaller number of 0+ calls from Verizon payphones during the Interim Period. *See* Opposition Brief of Operator Communications, Inc., File No. EB-05-MD-007 (filed Oct. 7, 2005) ("OCI Opp. Br.") at 8 and Exhibit A. OCI's attempt to revise the record was not substantiated by a declaration or affidavit, and therefore must be rejected.

[36] *See* OCI Initial Br. at 1, 30, Exhibit 10 (OCI's Responses to Interrogatory and Document Production Requests) at 2; OCI Opp. Br. at 6.

[37] *See* Verizon Initial Br. at 5-6; Verizon Opp. Br. at 2-7; Verizon Reply Br. at 1-2.

[38] *Id.*

[39] *See* Supplemental Responses to Answer and Affirmative Defenses, File No. EB-05-MD-007 (filed June 30, 2005) ("Supp. Answer"), Tab 1 (Hargrave Decl.) at 2-3, ¶¶ 6-10; OCI Initial Br. at 6-7, 11, 31-32; OCI Opp. Br. at i-ii, 3-8; Letter from Danny A. Adams, counsel OCI, to Secretary, FCC, File No. EB-05-MD-007 (filed Oct. 14, 2005) ("OCI Reply Br.") at 2-3.

[40] OCI Opp. Br. at 7 (citing *Clark v. Wilbur*, 913 F. Supp. 463 (S.D. W. Va. 1996), *aff'd*, 139 F.3d 888 (4th Cir. 1998)).

13. Second, acknowledging that some of the payphones may not have been presubscribed to OCI for the entire Interim Period,[41] Verizon asks us to assume that if at least one 0+ call from a Verizon payphone was delivered to OCI during a calendar quarter, then the payphone was presubscribed to OCI for that quarter.[42] For the same reasons, however, we find that there is an insufficient basis on which to determine that a phone was presubscribed for a calendar quarter based only upon proof that the phone was presubscribed to OCI during some point in that quarter.

14. Third, Verizon asks us to assume that if at least one 0+ call from a Verizon payphone was delivered to OCI during a particular month, the payphone was presubscribed to OCI for that entire month.[43] OCI concedes that these figures "indicate[], by a preponderance of the evidence, the *actual* Verizon payphones [for] which OCI was the presubscribed carrier."[44] OCI nevertheless contends that Verizon has not established that the payphones remained presubscribed to OCI for the entire month and that, as a result, no 0+ compensation is due.[45] OCI argues that PIC changes could occur at any time, and that, therefore, "[i]t is not possible to tell whether OCI was the presubscribed carrier for the entire month, or only for a portion of the month."[46]

15. Contrary to OCI's position, however, rule 64.1301(c) does not require Verizon to prove that its payphones were presubscribed to OCI the entire month in order to recover.[47] The rule only obligates Verizon to demonstrate that OCI was the PIC at some point during the month,[48] which Verizon has done. Again, Verizon bases its claim for compensation on evidence that establishes the number of payphones that were presubscribed to OCI for at least a portion of each month of the Interim Period. Accordingly, we find that Verizon has established by a preponderance of the evidence the number of its payphones that were presubscribed to OCI each month of the Interim Period.

16. OCI further argues that Verizon's claim should be denied because Verizon cannot show, as required by rule 64.1301(c), that it "was not compensated for 0+ calls originating during the [Interim Period]."[49] OCI does not assert that another carrier compensated Verizon for the payphones at issue. Rather, according to OCI, Verizon included a number of 0+ calls delivered from Verizon payphones to OCI in payphone call data submitted in the record of the *Fifth Payphone Compensation Order*

[41] *See* Verizon Initial Br. 7, Tab 3 (Fouke Decl) at 4, ¶ 11.

[42] *See* Verizon Initial Br. at 7-9, Attachment 3 (Fouke Decl.) at 5-6, ¶ 15; Verizon Opp. Br. at 7-9; Verizon Reply Br. at 1-2.

[43] *See* Verizon Initial Br. at 9-11; Verizon Opp. Br. at 3, 9; Verizon Reply Br. at 1-2.

[44] OCI Initial Br. at 30-31 (emphasis in original).

[45] *See* OCI Initial Br. at 28 ("Although OCI does not dispute that some unknown number of Verizon payphones were presubscribed to OCI during the Interim Period, the exact number is not established by Verizon"); OCI Opp. Br. at 7-8; OCI Reply Br. at 1-2.

[46] OCI Opp. Br. at 7-8.

[47] 47 C.F.R. § 64.1301(c).

[48] *See* 47 C.F.R. § 64.1301(c) ("an [IXC] to which the payphone was presubscribed during this same time period must compensate the [PSP] ... per payphone per month during the same time period . . .").

[49] 47 C.F.R. § 64.1301(c).

proceeding for the purpose of the Commission's Appendix A calculations.[50] OCI reasons that Appendix A thus overstates OCI's share of the payphone call market to the extent of these 0+ calls, thereby obligating OCI to pay excessive Interim Period dial-around compensation.[51]

17. OCI's argument is flawed. By definition, the figures included in Appendix A are utilized solely for purposes of determining an IXC's liability for dial-around, not 0+, compensation.[52] OCI's position, at best, is a challenge to Appendix A of the *Fifth Payphone Compensation Order* and, therefore, to OCI's obligation to pay dial-around compensation. Yet, OCI does not argue that Appendix A is unlawful and that Verizon's claim for *dial-around compensation* should be denied. Such a collateral attack on the *Fifth Payphone Compensation Order*, in any event, would be time barred.[53]

18. In sum, we find that OCI's defenses fail and that Verizon has established its claim for Interim Period 0+ compensation pursuant to rule 64.1301(c).[54] Applying the rule 64.1301(c) default amount to the number of Verizon payphones that were presubscribed to OCI during the Interim Period, OCI is liable to Verizon for Interim Period compensation in the amount of $504,120.00, before interest.[55]

C. Verizon's Claim for PIC Charges is a Mere Collections Action.

19. We dismiss without prejudice Verizon's claim that OCI's failure to pay Verizon's tariffed PIC charges for the period June 30, 2002 to October 1, 2003 violates section 201 of the Act.[56] As OCI argues, this claim is indeed a "collections action."[57] Although purporting to allege a violation of the Act, Verizon in fact states only an action for recovery of charges due under the terms of its tariff. Unlike the payphone compensation rules (requiring IXCs to pay),[58] the Commission's PIC charge

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[50] *See* Answer, Tab D (Legal Analysis) at 6 and Exhibit 1 (Letter from Verizon to Secretary, FCC); OCI Initial Br. at 16-17, 23.

[51] *See* Answer, Tab D (Legal Analysis) at 6-7 ("Because this amount [due under Commission rule 64.1301(a)] is inflated by an amount reflecting OCI's 0+ calls, OCI compensates Verizon for 0+ traffic through this [rule 64.1301(a)] obligation .... Therefore, Verizon's claim for 0+ compensation should be dismissed"); OCI Initial Br. at 16-17, 23; OCI Opp. Br. at 9 n.29.

[52] *See* 47 C.F.R. § 64.1301(a) ("each entity listed in Appendix A of the [*Fifth Payphone Compensation Order*] must pay default compensation to [PSPs] for *payphone access code calls and payphone subscriber 800 calls* for the [Interim] [P]eriod...") (emphasis added).

[53] *See* 47 U.S.C. § 402(a); 28 U.S.C. § 2344 (any party "aggrieved" by a "final [agency] order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies").

[54] OCI also argues that Verizon's rule 64.1301(c) claim should be denied because it is a "collection action,", and because rule 64.1301(c) is retroactive. *See* Answer Tab C (Summary) at i, Tab D (Legal Analysis) at 2-5, Tab E (Answer and Affirm. Defenses) at 14-15, ¶¶ 76-78; OCI Initial Br. at 32-34. We reject these arguments for the same reason we reject OCI's virtually identical arguments with respect to Verizon's rule 64.1301(a) claim. *See supra* at ¶¶ 7-8.

[55] *See* Verizon Initial Br., Attachment 3 (Fouke Decl.), Exhibit D (Table entitled "0+ Compensation Amounts").

[56] *See* Complaint at 14, ¶ 53 (alleging that OCI violated section 201of the Act and Commission orders by refusing to comply with Verizon's tariffed PIC charges).

[57] *See* Answer Tab D (Legal Analysis) at 12-13; OCI Initial Br. at 35.

[58] *See supra* at ¶ 4.

regime permitted IXCs to assess the charge on payphone lines.[59] As the Commission recently reiterated, "the Commission does not act as a collection agent for carriers with respect to unpaid tariffed charges."[60]

D. Verizon is Entitled to Pre-Judgment Interest at the Applicable IRS Rate for Corporate Overpayments.

20. Verizon is entitled to interest on the amounts owed it by OCI pursuant to rule 64.1301(a) and (c) at the applicable IRS rate for corporate overpayments, accruing on the second day of the second quarter following the quarter in which the calls were made. The Commission concluded in the *Fourth* and *Fifth Payphone Compensation Orders* that PSPs are entitled to interest on Interim Period compensation pursuant to rule 64.1301(a) and (c) at the applicable IRS rate for corporate overpayments.[61] The Commission also concluded that, in accordance with the quarterly payment system applicable to payphone compensation, interest would begin to accrue on the second day of the second quarter following the quarter in which the calls were made.[62] Accordingly, Verizon is entitled to such an award here.

21. OCI argues that the Commission should not award prejudgment interest, asserting that the "[f]acts described by Verizon do not demonstrate that an award of interest is warranted ...."[63] Yet, as discussed, the Commission has already explicitly held that PSPs such as Verizon are entitled to prejudgment interest. The Commission explained that such an accrual period was necessary to ensure that PSPs "receive[] full compensation for this period."[64] Nor does OCI identify any "facts described by

[59] *See* Complaint Tab E (Legal Analysis) at 16 (citing *Access Charge Reform*, First Report and Order, 12 FCC Rcd 15982, 16019, ¶ 92 (1997); *Access Charge Reform*, Order on Reconsideration, 18 FCC Rcd 12626, 12627, ¶ 3 (2003)).

[60] *U.S. TelePacific Corp.*, 19 FCC Rcd at 24557, ¶ 11. We dismiss without prejudice because Verizon may seek to recover PIC charges from OCI in an appropriate forum, including federal district court, if it so chooses. *See id.* at 24555-56, ¶ 8. *Cf. Global Crossing Telecomm.*, 127 S.Ct. at 1520 (refusing to pay payphone compensation required by Commission rules violates section 201(b) of the Act); *NetworkIP*, 12 FCC Rcd at 10492-95, ¶¶ 12-16 (same).

[61] *See Fourth Payphone Compensation Order*, 17 FCC Rcd at 2032, ¶ 31 ("interest shall be paid on interim ... period compensation at the rate established under Section 6621 of the Internal Revenue Code, 26 U.S.C. § 6621"); *id.* at 2035, ¶ 37 ("the interest rate applied to the interim period ... [is] the applicable interest rate set by the IRS pursuant to Section 6621 of the Internal Revenue Code for refund obligations"); *id.* at 2032 n.89 ("Appendix C [of this order] provides IRS rates for the last quarter of 1996 through March 31, 2002 ..."); *id.* at Appendix C (setting forth the IRS rate for overpayments); *Fifth Payphone Compensation Order*, 17 FCC Rcd at 21307-08, ¶¶ 99-100 (refusing to reconsider the *Fourth Payphone Compensation Order* ruling that the IRS-prescribed interest rate applies to late payment of Interim Period compensation).

[62] *See Fifth Payphone Compensation Order*, 17 FCC Rcd at 21308, ¶ 101("[T]he IRS-prescribed interest rate will only begin to accrue after the date payment normally would have been rendered under the quarterly payment system applicable to payphone compensation. Consistent with our assumptions under prior orders, the IRS-prescribed interest rate for payments that should have been made the first quarter of the year will begin accruing on July 2 of the same year, for the second quarter of the year on October 2 of that same year, for the third quarter on January 2 of the next year, and for the fourth quarter on April 2 of the next year.") (citations omitted).

[63] Answer Tab D (Legal Analysis) at 13-14.

[64] *In re Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Third Report and Order, and Order on Reconsideration of the Second Report and Order, 14 FCC Rcd 2545, 2636, ¶ 197 n.427 (1999).

Verizon" which would cause us to make an exception here.[65]

IV. ORDERING CLAUSES

22. ACCORDINGLY, IT IS ORDERED, pursuant to sections 1, 4(i), 4(j), 201, 208, and 276 of the Act, 47 U.S.C. §§ 151, 154(i), 154(j), 201, 208, 276, and sections 1.720-1.736 and 64.1301 of the Commission's rules, 47 C.F.R. §§ 1.720-1.736, 64.1301, that the above-captioned formal complaint is GRANTED IN PART and DISMISSED WITHOUT PREJUDICE IN PART.

23. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 4(j), 201, 208, and 276 of the Act, 47 U.S.C. §§ 151, 154(i), 154(j), 201, 208, 276, and sections 1.720-1.736 and 64.1301 of the Commission's rules, 47 C.F.R. §§ 1.720-1.736, 64.1301, that, within 90 days of release of this Order, OCI shall pay Verizon (a) damages (i) pursuant to Commission rule 64.1301(a), 47 C.F.R. § 64.1301(a), in the amount of $49,503.00, and (ii) pursuant to Commission rule 64.1301(c), 47 C.F.R. § 64.1301(c) in the amount of $504,120.00; and (b) interest on such damages at the applicable IRS rate for corporate overpayments, accruing on the second day of the second quarter following the quarter in which the calls at issue were made, and continuing through the date of payment.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[65] OCI argues further that pre-judgment interest should not be awarded because "the Commission delayed for five years before establishing any compensation obligation in the first place." Answer Tab D (Legal Analysis) at 13-14. We reject this argument for the same reasons we rejected OCI's argument that rules 64.1301(a) and (c) are unlawfully retroactive. *See supra* at ¶ 8.

CONCURRING STATEMENT OF COMMISSIONER MICHAEL J. COPPS

Re: *Contel of the South, Inc. d/b/a Verizon Mid-States, et al. v. Operator Communications, Inc.*, File No. EB-05-MD-007

While I agree with the Commission's decision in this case and believe that the parties are entitled to a decision, I concur in this Order to point out that the period of uncompensated payphone calls at issue occurred over 10 years ago, and the Defendant has subsequently sold the majority of its corporate assets and no longer provides telecommunications services. Thus, the practical impact of today's decision appears to be somewhat limited. I therefore must question whether the damages awarded to the Complainants at this late date constitute merely a Pyrrhic victory.

EXHIBIT 40

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Disabilities Rights, Inc.	)	File No. TRS-98-1
v.	)	
Sprint Relay	)	
	)	
	)	

ORDER

Adopted: May 25, 2000 Released: May 30, 2000

By the Chief, Telecommunications Consumer Division, Enforcement Bureau:

I. INTRODUCTION

1. In this Order, we dismiss a complaint filed against Sprint Relay (Sprint) by Disabilities Rights, Inc. (DRI) alleging violations of section 225 of the Communications Act of 1934, as amended,[1] and section 64.604(b)(5)m of the Commission's rules.

2. In the complaint, DRI alleges that Sprint's interstate relay systems have no mechanism or capability to connect Baudot TTY machines with personal computers that have ASCII modems.[2] According to DRI, "nearly all personal computers have modems that can transmit and receive ASCII, but nearly all such modems are not capable of communicating with Baudot terminals."[3] DRI argues that because many relay users rely on Baudot TTY machines, Sprint is violating its duty under section 225 of the Act and section 64.604(B)(3) of the Commission's rules.[4] DRI seeks a Commission order directing Sprint to offer "communications

[1] 47 U.S.C. § 225. This section, *inter alia*, directs the Commission to ensure that telecommunications relay service (TRS) is available, to the extent possible and in the most efficient manner, to individuals with hearing and speech disabilities in the United States. The section further provides that all common carriers must provide TRS in compliance with the regulations prescribed by the Commission. The Commission's regulations implementing section 225 are set forth in 47 C.F.R. §§ 64.601 – 64.608.

[2] DRI Complaint at 2. Baudot is a seven-bit code, only five of which are information bits. Baudot is used by some text telephones to communicate with each other at a 45.5 baud rate. 47 C.F.R. § 64.601(3). ASCII is an acronym for American Standard Code for Information Interexchange, which employs an eight-bit code and can operate at any standard transmission baud rate including 300, 1200, 2400, and higher. 47 C.F.R. § 64.601(2).

[3] DRI Complaint at 3.

[4] 47 C.F.R. § 64.604(b)(5) (TRS rules are not intended to discourage or impair the development of improved technology that fosters the availability of telecommunications to persons with disabilities).

between ASCII and Baudot terminals and computers as part of its relay system."[5]

3. After due consideration of this matter, we dismiss DRI's complaint. Sprint asserts correctly that the Commission has not previously required relay providers to offer protocol conversion services that would enable communications between Baudot TTY machines and personal computers.[6] Although the Commission concluded recently that section 225 does not prohibit it from requiring relay services to accommodate access to enhanced or information services,[7] we do not believe that a requirement that relay providers offer ASCII/Baudot protocol conversion for connecting TTY machines to personal computers can be properly established in the limited context of DRI's complaint. We note that the record in this matter consists solely of DRI's 4-page complaint and Sprint's 5-page answer, neither of which attaches affidavits or other supporting documentation. In any event, we conclude that the issues raised in the complaint have broad, industry-wide implications that are more appropriately addressed in the Commission's pending CC Docket No. 98-67 proceeding, in which all interested parties will have the opportunity to participate. We note that in that proceeding, the Commission specifically asked for comments on emerging and existing technologies that the Commission "has not yet fully evaluated for inclusion in relay service," among them new transmission protocols for TTYs.[8]

4. Accordingly, IT IS ORDERED THAT, pursuant to Section 225 of the Act, 47 U.S.C. § 225,and Sections 0.111 and 0.311 of the Commission's rules,[9] the above-captioned complaint filed by Disabilities Rights, Inc. IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Catherine W. Seidel, Chief
Telecommunications Consumer Division
Enforcement Bureau

[5] DRI Complaint at 3.

[6] Sprint Answer at 3.

[7] *Telecommunication Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CC Docket No. 98-67, Report and Order and Further Notice of Proposed Rulemaking, FCC No. 00-56 (rel. March 4, 2000) (*Report and Order and Further Notice*).

[8] *Report and Order and Further Notice* at ¶ 138.

[9] 47 C.F.R. §§ 0.111, 0.311.